

CONSUMER PROTECTION IN THE USED AND SUBPRIME CAR MARKET

HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS

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CONSUMER PROTECTION IN THE USED AND SUBPRIME CAR MARKET

THURSDAY, MARCH 5, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:12 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Bobby L. Rush (chairman) presiding.

Members present: Representatives Rush, Schakowsky, Sarbanes, Sutton, Stupak, Green, Butterfield, Barrow, Matsui, Castor, Braley, Radanovich, Stearns, Gingrey, Scalise and Barton (ex officio).

Staff present: Michelle Ash, Counsel; Christian Fjeld, Counsel; Anna Laetch, Professional Staff; Valerie Baron, Legislative Clerk; Brian McCullough, Minority Professional Staff; Will Carty, Minority Professional Staff; and Shannon Weinberg, Minority Counsel.

OPENING STATEMENT OF HON. BOBBY L. RUSH

Mr. RUSH. The committee will now come to order.

The chairman recognizes himself for 5 minutes for the purposes of opening statement. While the mortgage and home foreclosure crisis has garnered much-deserved attention in Congress and in the media, there has been much less focus on similar problems that are associated with the purchase of automobiles although repossession rates are on the rise and only getting worse. The National Association of Attorneys General lists auto issues as among its top 10 in consumer complaints. For poor and working-class Americans who do not own a home, automobiles are usually the single biggest asset they possess and they are essential in getting people to and from work, church and other places. As such, it is extremely important that when consumers, particularly low-income consumers, purchase their vehicles, the vehicles are, number one, in good working order, and two, affordable with reasonable financing terms.

Unfortunately, evidence suggests that fraudulent practices with regard to both the condition and financing of used cars are on the rise. When it comes to the condition of vehicles, consumers are too often unaware of previous damage inflicted on the vehicle. Cars could have been written off as "total loss" vehicles by the insurance companies, sold to salvage yards and then rebuilt and resold to consumers without them knowing the history of the vehicle. The National Motor Vehicle Title Information System, also known as

NMVTIS, will eventually be a valuable tool to aid consumers in obtaining the information about the condition of their vehicle and establishing a database in which States and other stakeholders share their title information. However, NMVTIS remains an incomplete project as only 13 States are participating in the system while 14 more provide information but not using NMVTIS as a primary resource.

Moreover, even when NMVTIS is fully operational, the database will only have limited benefits for consumers unless the information is made available to them at the point of purchase, that is, at the lot itself. Many car buyers, particularly low-income buyers, do not have a computer or Internet access to take advantage of NMVTIS. The FTC's Used Car Rules require dealerships disclose warranty information on every car they sell, a buyer's guide posted on the vehicle. I believed that the Used Car Rules and the buyer's guide could be a useful tool to provide customers with branding information on an automobile right at the point of purchase.

Consumers are also being increasingly fleeced by abusive financing schemes when buying cars and in most car transactions the dealership has a dual role. It not only sells the cars but arranges for financing as well. This one-stop shopping can be very beneficial to customers and dealerships can play a valuable role in assisting customers in their quest for a creditor. However, too often the dealership and the creditor work together to needlessly saddle customers with high-interest-rate loans of exorbitant fees. Such discretionary practices known as loan packing and dealer markup have a disparate impact on people of color, particularly on African-American and Latino consumers. Dealerships will also charge bogus "document fees" ranging from \$400 to \$700 for processing charges of minimal cost. Lastly, dealerships will conduct "yo-yo sales" where they send the customer off the lot with a car only to call him or her back several days later to renegotiate the terms of the loan under coercive conditions.

Let me close by saying that as chairman of this committee, I would like us to focus our consumer protection mission on matters that particularly affect poor and working-class people. Too often consumer protection issues are driven by upper- and middle-class interests and not enough attention is given to matters that disproportionately affect low-income customers and consumers. Today's hearing is only one of many that I hope to conduct that will focus on consumer matters that affect poor people.

With that, I yield back the balance of my time.
[The prepared statement of Mr. Rush follows:]



FOR IMMEDIATE RELEASE
March 5, 2009

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**Statement by the Honorable Bobby L. Rush, Chairman
Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection
Hearing on "Consumer Protection in the Used and Subprime Car Market"**
March 5, 2009

WASHINGTON, DC — "The subcommittee will come to order. While the mortgage and home foreclosure crisis has garnered much deserved attention in Congress and in the media, there has been much less focus on similar problems in the purchase of automobiles.

"Auto repossession rates are on the rise and are only getting worse. The National Association of Attorneys General list auto issues as among its top ten in the number of consumer complaints. For poor and working class Americans who do not own a home, automobiles are usually the single biggest asset they possess; and they are essential in getting people to and from work. As such, it is extremely important that when consumers, particularly low-income consumers, purchase their vehicles that the vehicles are (1) in good working condition, and (2) affordable with reasonable financing terms.

"Unfortunately, evidence suggests that fraudulent practices with regard to both the condition and financing of used cars are on the rise. When it comes to the condition of vehicles, consumers are too often unaware of previous damage inflicted on the vehicle. Cars could have been written off as "total loss" vehicles by the insurance companies, sold to salvage yards, and then rebuilt and

— more —

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re-sold to consumers without them knowing the history of the vehicle. The National Motor Vehicle Title Information System, also known as NMVTIS, will eventually be a very valuable tool to aid consumers in obtaining information about the condition of their vehicles by establishing a database in which states and other stakeholders share their title information. However, NMVTIS remains an incomplete project as only 13 states are fully participating in the system, while 14 more are providing information, but not using it as a resource.

Moreover, even when NMVTIS is fully operational, the database will only have limited benefits for consumers unless the information is made available to them at the point of purchase – that is, *at the lot itself*. Many car buyers – particularly low-income buyers – do not have a computer or Internet access to take advantage of NMVTIS. The FTC's "Used Car Rule" requires that dealerships disclose warranty information on every car they sell with a "Buyers' Guide" posted on the vehicle. I believe that the "Used Car Rule" and the "Buyers Guide" could be a useful tool to provide customers with branding information on an automobile at the point of purchase.

Consumers are also being increasingly fleeced by abusive financing schemes when buying cars. In most car transactions, the dealership plays a dual role: it not only sells the car, but arranges for the financing as well. This one-stop shopping can be very beneficial to consumers, and dealerships can play a valuable role in assisting customers find a creditor. However, too often the dealership and the creditor work together to needlessly saddle customers with high interest loans or exorbitant fees. Such discretionary practices known as "loan packing" and "dealer markups" have a disparate impact on people of color, particularly African American and Latino consumers. Dealerships will also charge consumers bogus "document fees" – ranging from \$400 to \$700 – for processing charges of minimal cost. Lastly, dealerships will sometimes conduct "yo-yo sales" where the dealer sends the customer off the lot with a car, only to call him or her back several days later to renegotiate the terms of the loan under coercive conditions.

While federal and state laws exist to protect consumers from such abusive practices, they arguably make up a patchwork that has proven to be largely ineffective. Section 5 of the FTC Act gives the FTC broad enforcement authority against "unfair or deceptive acts or practices"; and

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Section 18 of the Act gives the Commission rulemaking authority to address specific “unfair or deceptive acts or practices.” In today’s hearing, I would like to know whether the Commission is effectively using this authority and whether Congressional action is needed to facilitate adequate Commission action.

“Finally, as Chairman of the subcommittee, I would like us to focus our consumer protection mission on matters that particularly affect poor and working class people. Too often, consumer protection issues are driven by upper middle class interests and not enough attention is given to matters that disproportionately affect low-income consumers. Today’s hearing is only one of many I hope to conduct that will focus on consumer matters affecting poor Americans.

“With that, I yield back the balance of my time.”

#

Mr. RUSH. And I recognize now for 5 minutes for the purposes of opening statement the ranking member of the subcommittee, Mr. Radanovich.

OPENING STATEMENT OF HON. GEORGE RADANOVICH

Mr. RADANOVICH. Thank you, Mr. Chairman. I appreciate you calling today this hearing to protect consumers in the used-car market.

A car is one of the single biggest purchases that consumers make, and although a car is a depreciating asset, it is quite often invaluable to the owner, particularly if it is the only way to travel to work and earn a paycheck. While many in this room live in big cities with mass transit, those of us in more rural areas lack such conveniences. My district is an agricultural hotspot with farms that cover vast acreage in the beautiful San Joaquin Valley in California and workers are often geographically separated from their place of work by many miles with few, if any, viable alternatives for commuting. Without a car, getting to work can be nearly impossible regardless of income, so it is vitally important that they find a safe, reliable car, and the last thing anybody needs is to find out that the car she has purchased has hidden damage that can greatly reduce the car's value, or worse, present a safety hazard to her and her family.

In the aftermath of Hurricane Katrina, this committee's attention was drawn to the fact that hundreds of thousands of cars were flooded and should not be resold and put back on the road. And although State laws usually require the title of the damaged car to carry a brand reflecting the car's true condition, unscrupulous people find ways to obtain new clean title in another State, a practice referred to as title washing. With a clean title, the path is clear to sell the car to an unsuspecting consumer or business.

Because of the varying State laws, the NMVTIS system was mandated by the Anti-Car Theft Act of 1992 to provide an interoperable electronic system for the States and for law enforcement to improve title efficiency and reduce fraud. However, technological barriers and chronic underfunding have prevented the system from truly helping to eliminate title washing.

Recently, however, the DOJ has opened the system to the public and required information to be provided by private-sector entities such as insurance companies and salvage yards, and while it is improving, the system remains only as good as the information that goes into it. Unfortunately, only 27 States are currently participating in providing information, and one of them, my home State of California, is not allowing the information to be made public.

In the interim, American entrepreneurial spirit has filled the information void and produced several competing information products that are commercially available to consumers and businesses to research a car's history. Paying a handful of dollars to research a car for what a consumer will pay thousands of dollars is money well spent. I am pleased that one of the companies, Experian, will be testifying today about their auto check service, and I am interested to hear whether NMVTIS will become an additional tool for the consumer or a replacement to a private-sector service.

In addition to buying a car with hidden damage, consumers must avoid other pitfalls to purchasing a used car. In fact, a plethora of State and federal laws already exist to inform and protect consumers. The FTC's Used Car Rule requires information of existing warranty to be disclosed through a buyer's guide label on the car and many States have laws restricting certain fees and mandating additional disclosures.

Despite these protections, reports of some abusive sales and lending practices by a small minority of unscrupulous actors still persist. The report comes at precisely the time when many of our fellow Americans have lost their jobs or have reduced income from the slowing economy and cannot afford the additional costs. With many State budgets busting at the seams, the State and local enforcement we depend on to protect consumers is susceptible to the restraints of limited resources, and under the economic climate, we must ensure that our laws work effectively to protect consumers and eliminate fraudulent practices that result in unnecessary costs to consumers.

Owning a car is an expensive proposition. Financing costs, insurance premiums, maintenance, gas and State and local taxes require a substantial portion of income for the average American. I don't have to tell my fellow Californians who may see our gas prices increase and vehicle registration fees increase this year to offset our budget cars. But cars today are also safer, more advanced technologically and last longer than any time in history. I think any discussion of affordability must also examine the role of the federal and state mandates and taxes, and I also believe that if we want to help consumers, any measure we discuss must be carefully examined to ensure that they do not increase compliance costs that only result in higher purchase prices and ownership costs.

Mr. Chairman, I look forward to working with you and making sure that consumers have access to the information they need to make an informed car purchase and that unscrupulous actors who would violate the law are brought to justice.

Mr. Chairman, I yield back.

[The prepared statement of Mr. Radanovich follows:]

Statement of the Honorable George Radanovich
Ranking Member, Subcommittee on Commerce, Trade and Consumer Protection
Hearing on "Consumer Protection in the Used and Subprime Car Market"
March 5, 2009
(837 words)

Thank you, Mr. Chairman, for calling today's hearing to protect consumers in the used car market. A car is one of the single biggest purchases a consumer makes, and although a car is a depreciating asset, it is quite often invaluable to the owner, particularly if it is the only way to travel to work and earn a paycheck. While many in this room live in big cities with mass transit, those of us in more rural areas lack such conveniences.

My district is an agricultural hot spot with farms that cover vast acreage in the beautiful San Joaquin valley. Workers are often geographically separated from their place of work by many miles with few, if any, viable alternatives for commuting. Without a car, getting to work can be nearly impossible, regardless of income. So it is vitally important they can find a safe, reliable car. And the last thing anyone needs is to find out that the car she has purchased has hidden damage that can greatly reduce the car's value, or worse, present a safety hazard to her and her family.

In the aftermath of Hurricane Katrina, this Committee's attention was drawn to the fact that hundreds of thousands of cars were flooded and should not be resold and put back on the road. Although State laws usually require the title of the damaged car to carry a brand reflecting the car's true condition, unscrupulous people find ways to obtain a new clean title in another State – a practice referred to as "title washing." With a "clean" title, the path is cleared to sell the car to an unsuspecting consumer or business.

Because of the varying state laws, the NMVTIS ("Nim-Vee-Tis") system was mandated by the Anti Car Theft Act of 1992 to provide an interoperable electronic system for the States and for law enforcement to improve title efficiency and reduce fraud. However, technological barriers and chronic under-funding have prevented the system from truly helping to eliminate "title washing."

Recently, however, the DOJ has opened the system to the public and required information to be provided by private sector entities, such as insurance companies and salvage yards. While it is improving, the system remains only as good as the information that goes into it. Unfortunately, only 27 states are currently participating and providing information. And one of them – my home state of California – is not allowing the information to be made public.

In the interim, the American entrepreneurial spirit has filled the information void and produced several competing information products that are commercially available to consumers and businesses to research a car's history. Paying a handful of dollars to research a car for which a consumer will pay thousands is money well spent. I am pleased one of the companies, Experian, will testify today about their Auto Check service

| and I am interested to hear whether NMVTIS will become an additional tool for the consumer, or a replacement to private sector services.

In addition to buying a car with hidden damage, consumers must avoid other pitfalls to purchasing a used car. In fact, a plethora of State and Federal laws already exist to inform and protect consumers. The Federal Trade Commission's Used Car Rule requires information of any existing warranty be disclosed through a Buyers' Guide label on the car. And many States have laws restricting certain fees and mandating additional disclosures.

Notwithstanding these protections, reports of some abusive sales and lending practices by a small minority of unscrupulous actors persist. The reports come at precisely the time when many of our fellow Americans have lost their jobs or have reduced income from the slowing economy and cannot afford additional costs.

With many State budgets busting at the seams, the State and local enforcement we depend on to protect consumers is susceptible to the constraints of limited resources. Under this economic climate, we must ensure our laws work effectively to protect consumers and eliminate fraudulent practices that result in unnecessary costs to consumers.

Owning a car is an expensive proposition. Financing costs, insurance premiums, maintenance, gas, and State and local taxes require a substantial portion of income for the average American. I don't have to tell my fellow Californians – who may see our gas prices increase and vehicle registration fees increase this year to offset our budget deficit. But cars today are also safer, more advanced technologically, and last longer than any time in history. I think any discussion of affordability must also examine the role of Federal and State mandates and taxes. I also believe that if we want to help consumers, any measures we discuss must be carefully examined to ensure they do not increase compliance costs that only result in higher purchase prices and ownership costs.

Mr. Chairman, I look forward to working with you to make sure consumers have access to the information they need to make an informed car purchase and that unscrupulous actors who would violate the law are brought to justice.

I yield back.

Mr. RUSH. I want to thank the ranking member.

The next member the chair recognizes is the gentleman from Maryland, Mr. Sarbanes, recognized for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JOHN P. SARBANES

Mr. SARBANES. Thank you very much, Mr. Chairman. Thanks for holding this hearing. You said it rightly when you pointed out that we have had a lot of focus on the subprime mortgage industry and all the abuses that have to be there but we are increasingly discovering that there was and continues to be in many respects a sort of subprime culture that has developed out there and the tentacles of it reach far and wide, and in some senses the place where subprime meets the financial entrepreneur is a place where predators lurk and it is not just about a subprime culture, it is about an emerging predatory culture. Certainly in the arena in the purchase and sale of automobiles the potential for abuse is high. There is a legion of opportunities to take advantage of people and exploit people and that is what this hearing hopefully is going to shed some light on.

I expect we will come from this hearing with many perspectives but among them will certainly be that additional protections for the consumer are needed in this arena, and another will be that the depths of this culture of subprime and the potential for predators is very high and extends to many arenas so we have to be vigilant for what those other arenas can be going forward.

So thank you for calling this hearing and I am looking forward to hearing the testimony from the panel. Thank you.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the former ranking member of this subcommittee, the former chair of the subcommittee, the gentleman from Florida, Mr. Stearns is recognized for the purposes of an opening statement for 2 minutes.

OPENING STATEMENT OF HON. CLIFF STEARNS

Mr. STEARNS. Good morning, and thank you, Mr. Chairman. Thank you for having this hearing. As you mentioned, in the 109th Congress I was chairman of the subcommittee. We examined this problem of title washing and fraud to discuss better ways to protect the consumers who unknowingly purchase these vehicles and they were damaged, and I thank you very much, Mr. Chairman, for continuing the investigation.

This year again we introduced the Damaged Vehicle Information Act, which is H.R. 1257, with my distinguished colleague from Texas, Mr. Green, and I thank him sincerely for his support. Our bill would require vehicle identification numbers, VINs, of totaled vehicles to be immediately sent to the vehicle history databases which would then be made available immediately to the public so that consumers would be provided with complete information regarding any salvaged or flooded automobile that they may be purchasing. Towards that end, Mr. Chairman, I ask unanimous consent to put in the record a letter from the Salvage Auto Fraud Reform Coalition, which represents millions and millions of vehicles and a list of the supporters including Experian, who is a witness

today, including, Mr. Chairman, the National Association of Minority Automobile Dealers, for their support for Mr. Green and our legislation, H.R. 1257. May I put that in the record, Mr. Chairman, by unanimous consent?

Mr. RUSH. So ordered.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. We are all aware, I think, of what the problem is, and as I pointed out, we have bipartisan support here. We had 80 cosponsors in the last Congress and we worked it through the National Highway Traffic Safety Administration, NHTSA, to ensure this public disclosure of damaged vehicles. DOJ's system, which is NMVTIS, the National Motor Vehicle Title Information System, was only recently made available to the public on January 30 and is operating off an incomplete database, so NMVTIS doesn't specifically track vehicles that have been damaged and had airbags deployed and the entry of data on this system often lags behind the time it takes to obtain a new title for a damaged car in another State. Thus, I believe NHTSA is the right agency to be charged with tracking damaged vehicle information, and of course, Mr. Chairman, as you know, this is in our jurisdiction and we have been a very strong advocate for the consumers, and I thank you for having this hearing.

[The prepared statement of Mr. Stearns follows:]

Statement of the Honorable Cliff Stearns
CTCP Subcommittee Hearing
"Consumer Protection in the Used and Subprime Car Market"
March 5, 2009

Thank you, Mr. Chairman.

I am pleased to be here today for this important consumer protection hearing on cars in the used and subprime market. In the 109th Congress while I was Chairman of this Subcommittee, we examined the problem of title washing and fraud to discuss ways we could better protect consumers from unknowingly purchasing flooded and damaged vehicles, and I thank Chairman Rush for affording us the chance to revisit this critical issue.

This year, I have once again reintroduced my Damaged Vehicles Information Act (H.R. 1257) with my colleague from Texas, Mr. Green, and I thank him for his support. H.R. 1257 would require vehicle identification numbers (VINs) of totaled vehicles to be *immediately* sent to vehicle history databases – which would be made available to the public – so that consumers will be provided with complete information regarding any salvaged or flooded automobile they may be purchasing.

We are all well aware that title washing, although illegal, is still alive and well in the used car market. In the year 2005 alone, over 5 million vehicles were “totaled” by insurance companies. 500,000 of these were from Hurricanes Katrina and Rita. These damaged cars can easily be transported from one state to another where the title of the car will no longer indicate the vehicle has been damaged. These kinds of vehicles pose a significant safety risk to the unknowing consumers who purchase them.

My legislation, which has enjoyed broad bipartisan support including 80 cosponsors last Congress, works through the National Highway Traffic Safety Administration to ensure public disclosure of damaged vehicle information. DOJ's system NMVTIS (National Motor Vehicle Title Information System) was only recently made available to the public on January 30th and is operating off an incomplete database. Additionally, NMVTIS doesn't specifically track vehicles that have been damaged and had airbags deployed, and the entry of data on the NMVTIS system often lags behind the time it takes to obtain a new title for a damaged car in another state. Thus, I believe NHTSA is the right agency to be charged with tracking damaged vehicle information.

I thank the Chairman for holding this hearing and look forward to hearing from our witnesses.

QUESTIONS (5 minutes)

Brief Background:

Mr. RUSH. The chair thanks the gentleman. Now the chair recognizes my friend, the chair of the Oversight Subcommittee of this committee, the gentleman from Michigan, Mr. Stupak, is recognized for the purposes of opening statement for 2 minutes.

Mr. STUPAK. Thank you, Mr. Chairman. I will waive my opening as I would like to reserve my time for questions.

Mr. RUSH. The chair thanks the gentleman. The chair therefore proceeds to recognize the gentleman from Texas, my friend, Mr. Green, for the purposes of opening statement for 2 minutes.

OPENING STATEMENT OF HON. GENE GREEN

Mr. GREEN. Thank you, Mr. Chairman, for holding this hearing on consumer protection in the used car market. There are a number of issues we will be looking at in the hearing. I look forward to hearing from our witnesses on financing scams, title washing and the ability of consumers to find basic background history of used cars.

Used car scams have been around for decades but since 2001 in my hometown of Houston we have seen spikes in flood damage-related fraud after Tropical Storm Allison, Hurricane Katrina and again last fall with Hurricane Ike. Technology has made Carfax and Autofax reports more accessible and programs like the DOJ's National Motor Vehicle Title Information System, which more States are beginning to participate in, will help consumers and used car dealers alike. Unfortunately, some unscrupulous used car dealers will remain and the individuals they will take advantage of will most likely be those who are unable to access information such as vehicle history reports or simply don't know it is available or where to find it. The president of the Houston Better Business Bureau stated in a Houston Chronicle article last March that their office still receives one or two complaints a week from individuals who have unknowingly purchased previously wrecked or otherwise damaged cars. For low-income individuals and families who do not own homes, a vehicle is probably their single biggest asset and depend on it for their income and can least afford to pay for repairs or go without that vehicle if it in the shop.

I hope to hear from our witnesses on how we can best make vehicle history information available to all consumers prior to purchase. I also look forward to the testimony on abusive practices during the purchasing and financing process. This is something that the subcommittee has looked at in the past and the problems in accessing vehicle history but there can be just as much fraudulent activity in this part of the process and it disproportionately affects the same parts of the population.

Again, I want to thank our chairman and my good friend from Chicago for holding the hearing. I look forward to working on legislation to solve that problem. I yield back my time.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the gentleman from Georgia, Dr. Gingrey.

OPENING STATEMENT OF HON. PHIL GINGREY

Mr. GINGREY. Mr. Chairman, thank you. In the way of disclosure, I want to say that my dad and my two uncles were in the used car business almost all their adult lives, and I would like to have a dol-

lar for every hour I spent going with them to New York to Jerome Avenue to buy some of these used cars and take them south or sit around an auction lot for hours and hours while they were purchasing cars, so I have a lot of interest in this issue.

Chairman Rush, I want to thank you for calling the hearing and it does affect so many Americans each year. The purchase of a used car, the United States Department of Transportation estimated in 2007 that almost 41.5 million used cars were purchased in the United States. I have got four of them. In these challenging economic times, individuals around the country will first look to the used car sector when buying a car to keep their own cost down so therefore it is incumbent on this subcommittee to ensure that individuals have access to the most pertinent and up-to-date information on the cars that they plan to purchase.

In 1992, Congress took a large step toward preventing auto fraud, particularly this issue of title washing, when it passed the National Motor Vehicle Title Information System. I also applaud, Mr. Chairman, the work of my good friend from Florida, Mr. Stearns, for the work on this issue in both the 109th and 110th Congresses. He introduced the Damaged Vehicle Information Act to direct the National Highway Transportation Safety Administration, NHTSA, to provide information about the fair market value and the safety of automobiles. So I look forward to working with him on this legislation and with you, Mr. Chairman, during this Congress.

You know, despite the attempts to compel the full disclosure of auto information through NMVTIS, there have been a number of obstacles at the State level to get the information distributed. As a result, the private sector through a number of sources has been able to fill the void left by the federal and State governments to get vehicle history information including title and damage information into the hands of the consumer. It is my hope that any legislative remedy we may find will not undercut the ongoing efforts that the private sector is doing in their endeavors to help consumers.

Mr. Chairman, as we move forward on this important issue, we must also recognize the number of existing federal and State laws that address a number of components of the used car industry. I would suggest that we move cautiously on the issue because it is critically important for us to enforce the laws that we already have before adding new layers of federal regulation and bureaucracy, but I know it is a problem. I look forward to hearing from all the witnesses this morning on this important issue, and Mr. Chairman, I yield back.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the vice chair of the subcommittee, my friend from Illinois, Ms. Schakowsky, for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY

Ms. SCHAKOWSKY. Thank you, Mr. Chairman, for holding this hearing.

As has been said, for many people buying a new or used car may be the largest purchase that they ever make outside of purchasing a home. Far too often, consumers with a lack of resources or poor

credit are taken advantage of and it is our responsibility to ensure that it doesn't happen to anyone regardless of their income. Consumers should have access to reliable and accurate information, even if they don't have access to Web sites or Consumer Reports magazine. Likewise, they should be assured that when they sign a contract, they are getting the best deal possible, even if they don't have access to a lawyer or financial adviser. It is also imperative that outright instances of fraud are addressed and that the Federal Trade Commission has the appropriate authority and resources to do so. In Illinois in 2007, complaints about new and used car sales were one of the top 10 consumer complaints reported to the Office of the Attorney General that year. There were nearly 1,500 complaints in 1 year alone. It is clear that this is an issue that needs more attention.

I also want to address the issue of cars sold across State lines with titles that have been cleared of the vehicle's history. These histories may include accident damage or other circumstances such as natural disaster damage that is critical for the buyer to know. For instance, cars that were flooded during Hurricane Katrina had severe saltwater damage but were sold with titles that did not reflect this history. Saltwater can be incredibly destructive to cars, making them more likely to break down. A car in the shop is costing money and isn't getting the owner to his or her job.

It is not just a fairness-in-value issue. There are also serious safety concerns. A California teenager, Bobby Ellsworth, was killed in 2003 when the used pickup truck he was riding in crashed and the airbags did not deploy. The truck had been totaled in a previous accident and resold at auction but the airbags had never been replaced. The spaces for the airbags were stuffed with paper towels. The National Motor Vehicle Title Information System is slowly being built and implemented by the Department of Justice to share information between States and with consumers. It is critical that this effort must move forward quickly. I say in my district we have many public transportation options but in general we remain car-dependent and it is our responsibility in Congress to ensure consumer protection for auto purchases.

Thank you, Mr. Chairman.

Mr. RUSH. The chair now recognizes the gentleman from Iowa, Mr. Braley, for the purposes of opening statement.

OPENING STATEMENT OF HON. BRUCE L. BRALEY

Mr. BRALEY. Thank you, Mr. Chairman, and Ranking Member for holding this hearing.

To my friend from Georgia, I think we have had some parallel life experiences. I have very fond memories of helping my uncle do inventory of parts at his dealership in my hometown of Brooklyn, Iowa, and he worked at that dealership for 60 years. My brother-in-law ended up working with him.

One of the things that concerns me about this economic crisis is the ripple effect it is having on car dealerships all over the country who are being weeded out by automakers who are turning their backs on the dealership network that built their companies in the first place. But I also know that any business and any profession is only as strong as how the public perceives them, and usually it

is the weakest links in our professions and our businesses that drive the demand for public action and that is why this hearing is so important, Mr. Chairman, because we know from the materials that have been provided to the committee including the letter drafted by my attorney general, Tom Miller, that there are numerous problems that become some of the most compelling issues that attorneys general all over the country face on a daily basis, which is issues of consumer fraud that directly relate to these important purchases.

I also, Mr. Ranking Member, grew up and live in a district where there are more pickup sales, I think, than there are automobile sales because of the large agricultural businesses that depend on those vehicles and so when these purchases are made, they are made with the understanding and the good-faith belief that the vehicles that are being obtained are going to live up to the representations that have been made, and that is why even though these challenges are great and the solutions are not going to be easy for many people, the more we do together to create a system where the public and the dealers have faith that the product they are providing lives up to the high expectations of consumers and this government, the more we are going to move toward a day when we have faith and confidence that those purchases are going to be legitimate, they are going to be dependable, and I think that more than anything is going to restore confidence in the U.S. automobile industry, and that is why I look forward to working with everyone here today in making that day come.

Mr. RUSH. The chair will proceed now to recognize the gentlelady from Florida, Ms. Castor, for 2 minutes of opening statement.

Ms. CASTOR. Thank you, Mr. Chairman. I will waive my opening statement at this time and I look forward to hearing the testimony.

Mr. RUSH. With that said, the chair now recognizes the gentleman from North Carolina, my friend, Mr. Butterfield, for the purpose of opening statement.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman, for convening this very important hearing today and thank you for your leadership. I also thank the six witnesses for their anticipated testimony this morning.

Mr. Chairman, I cannot say that my father was a used car dealer but what I can say is that my ex-wife's father was a used car dealer. He is a very delightful man who is now 90 years of age and is and was very respected in our community because he treated people right.

Mr. Chairman, according to the Hill newspaper yesterday, I live in the fourth district from the bottom in terms of annual median income in the United States, number four from the bottom. That means I have a lot of poor people in my district and so this issue really strikes home to me. The experience of owning a car does tremendous things for a person. Not only does it get them to work, it gives them freedom, it gives them independence and pride, and certainly a great number of people in the United States have had this experience but for some the experience has not been so great. Many people including those who have low income or minorities or

they speak a different language, they have fallen victim to predatory dealers who take advantage of their lack of knowledge and experience when purchasing a vehicle.

Of particular interest to me is the abusive financing practices employed by some dealers. Many car dealers, and I have personally experienced this, discourage customers from securing private financing from a local bank. The dealers prefer to finance the deal. They shop around for financing companies that will split a higher interest rate with the dealer, benefiting both the dealer and the financer but harming the consumer. Another problem, Mr. Chairman, is that some dealers charge excessive fees for processing paperwork. These fees can be as much as \$700 on a car that isn't worth much more than that.

So Mr. Chairman, I have run out of time. This hearing today is most appropriate. I thank you for convening it and I look forward to the testimony of the witnesses. I yield back.

Mr. RUSH. The chair now recognizes my friend from my home State of Georgia, Mr. Barrow, for 2 minutes of opening statement.

Mr. BARROW. I thank the chair. I will waive an opening.

Mr. RUSH. The chair thanks the gentleman. Now we will proceed to the gentlelady from Ohio. Ms. Sutton is recognized for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. BETTY SUTTON

Ms. SUTTON. Thank you, Mr. Chairman. Chairman Rush, thank you for holding this important hearing today on consumer protection in the auto market.

For many working families in Ohio, in my district and across the country, frankly, cars are essential to their livelihood. Consumers in the market for used cars need accurate and reliable information in order to make sound purchasing and financing decisions, and the National Motor Vehicle Title Information System went public on January 30, 2009. By facilitating the electronic exchange of information between States, insurance companies and salvage yards, consumers will now have information about the history and condition of used cars they are considering purchasing. The database system will protect consumers from fraud and unsafe vehicles and in addition taxpayer savings are estimated to be between \$4 billion and \$11 billion annually.

Now, I am proud to note that Ohio is one of the 13 States that is already fully participating in the National Motor Vehicle Title Information System by providing data and inquiring into the system before issuing new titles. But we need to ensure that all of the States are fully participating and we need to find efficient ways to make the information available to consumers and buyers. Not all consumers have access to electronic media so I would be interested in hearing from the witnesses today on ways to provide the database services to consumers in addition to over the Internet.

I look forward to the testimony and the recommendations from today's witnesses, and I yield back the balance of my time.

Mr. RUSH. The chair thanks the gentlelady. Now we will proceed to the matter of the witnesses. We want to first of all thank the witnesses collectively for taking time out of your busy schedule to be here to share your information not only with the members of

this subcommittee and the Members of Congress but also the citizens of this Nation. You are indeed doing a great service for our country in that you have taken the time out to come and provide testimony on this very important and vital issue.

I want to introduce you now and then, as is the new custom of this committee, we will have you sworn in for testimony after the introduction of each and every one of you. First of all, to my left and to your right, those in the audience, Ms. Eileen Harrington. She is the acting director of the Bureau of Consumer Protection for the Federal Trade Commission. We want to welcome you, Ms. Harrington. Next to her is Mr. James H. Burch II. He is the acting director of the Bureau of Justice Assistance for the Department of Justice. Mr. Burch, we welcome you. Next to Mr. Burch is Ms. Rosemary Shahan. She is the president of Consumers for Automobile Reliability and Safety. We want to thank you and welcome you for your participation. Next we have Mr. John W. Van Alst. He is the staff director of the National Consumer Law Center. Mr. Van Alst, we certainly welcome you. Mr. Keith Whann is the general counsel of the National Independent Automobile Dealers Association. Mr. Whann, thank you and we welcome you. And last but not least is Mr. Scott Waldron, who is the president of a company called Experian Automotive, and we certainly welcome you for your participation.

And now if you would join me in rising from your seats, we will issue the oath. Please let the record reflect that all witnesses once they have indicated will have answered in the affirmative.

[Witnesses sworn.]

Mr. RUSH. Now we will begin with Ms. Harrington for the purposes of 5 minutes of opening statement.

TESTIMONY OF EILEEN HARRINGTON, ACTING DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION; JAMES H. BURCH II, ACTING DIRECTOR, BUREAU OF JUSTICE ASSISTANCE, DEPARTMENT OF JUSTICE; ROSEMARY SHAHAN, PRESIDENT, CONSUMERS FOR AUTOMOBILE RELIABILITY AND SAFETY; JOHN W. VAN ALST, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER; KEITH WHANN, GENERAL COUNSEL, NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION; AND SCOTT WALDRON, PRESIDENT, EXPERIAN AUTOMOTIVE

TESTIMONY OF EILEEN HARRINGTON

Ms. HARRINGTON. Thank you very much, Chairman Rush, Ranking Member Radanovich and members of the committee.

The Federal Trade Commission's formal testimony has been submitted for the record this morning. My oral statement and any questions that I answer reflect my views, not necessarily those of the Commission.

Consumers in the market for a used car need access to truthful information that will help them make good purchasing decisions. The Commission's Used Car Rule helps consumers get some important pieces of information. First, it prohibits dealers from making misrepresentations about the car, and second, it requires them to display a buyer's guide on the used car that they are selling. The

buyer's guide conveys to consumers whether the car sold is sold as is, meaning that the dealer assumes no responsibility for future repairs, or is covered by a warranty. If it is covered by a warranty, dealers must disclose what portion of the repair costs the dealer will pay. Because this information must be displayed on each used car offered for sale, shoppers can walk a used car lot and make immediate effective comparisons. Since 1985 the Commission has partnered with State and local consumer protection agencies to enforce the Used Car Rule. This partnership has resulted in hundreds of State enforcement actions as well as 80 federal actions and federal civil penalty orders totaling more than \$1 million. In addition, hundreds of state actions have been brought to enforce compliance with the rule and the FTC has directly supported those State enforcement actions by providing training and investigative assistance.

The FTC is currently reviewing the Used Car Rule to examine its effectiveness and to determine whether amendments could increase that effectiveness. As part of our review, we asked for comments and we have received many thoughtful comments, some from the panelists you will hear from today. Generally, commenters expressed support for the rule. Some suggest expanding its scope to require broader disclosures and others prefer to make only minor modifications. I can't comment on the Commission's likelihood of adopting any particular recommendation today but we will of course give all comments careful consideration as the Commission considers next steps.

Consumer education materials put out by the FTC encourage consumers to get information about a car's condition by seeking an independent inspection and by checking the car information against the National Insurance Crime Bureau's database of vehicle. These steps can help consumers avoid buying cars that have prior damage, and we are pleased, as some of the members have also indicated, that the Department of Justice's National Motor Vehicle Title Information System, which compiles information from States, insurance carriers and salvage yards, has recently been made available to consumers. The emergence of these and other publicly available databases can help consumers get accurate information about a car's titling, odometer data and certain damage history, and the Commission staff is updating our education materials to tell consumers about the newly available DOJ system. And we certainly recognize comments made by some of the members about the digital divide, how to get information to consumers who don't have Internet and electronic information access is a big challenge, and I am happy to talk more about that later in questions and answers.

Of course, to buy a car, a consumer usually needs a loan. At the FTC, we protect consumers at every stage of the credit lifecycle from when credit is first advertised to when debts are collected. The Commission does this by enforcing section 5 of the FTC Act, which prohibits unfair and deceptive acts and practices as well as through enforcement of the Truth in Lending Act. Most recently the FTC's work in this area has focused on mortgage lending but the FTC has previously brought 29 cases alleging deception in the advertising of financing and lease terms for cars. In these cases car manufacturers, dealerships and ad agencies settled FTC charges

that their ads misrepresented credit or lease terms available to consumers.

As important as loan origination is, however, it is just as important for consumers to avoid falling deeply into debt on a loan secured by their car. Some debt cycles can begin with an emergency need for cash that is fulfilled by costly car title loans. The Commission enforces the Truth in Lending Act to make sure consumers know the cost of credit including high-cost payday and car title loans, and the Commission protects consumers who fall into debt by enforcing the Fair Debt Collection Practices Act. Pursuant to these statutes, the FTC investigates and brings law enforcement actions against lenders, abusive debt collectors, credit repair companies and debt settlement firms who target delinquent customers who are in default.

Thanks again for the opportunity to testify. I am happy to take your questions.

[The prepared statement of Ms. Harrington follows:]

**PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION
On
CONSUMER PROTECTION IN THE USED AND SUBPRIME CAR MARKET**

Before the

**HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER
PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES**

**Washington, D.C.
March 5, 2009**

Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee, I am Eileen Harrington, Acting Director of the Bureau of Consumer Protection of the Federal Trade Commission. I appreciate the opportunity to appear before you today to discuss consumer protection issues connected to the purchase and financing of used cars, and related subprime credit issues.

This testimony will discuss three main challenges that consumer protection agencies face in the used car market: identifying and making available to consumers important information about the car, such as its condition and history, so they can make sound purchasing decisions; preventing deception in the financing of car loans; and helping consumers avoid debt cycles that can lead to the repossession of the car. In each of these areas, federal and state consumer protection agencies share authority and responsibility. For its part, the Commission issued the Used Motor Vehicle Trade Regulation Rule¹ (“Used Car Rule” or “Rule”), which requires that certain disclosures about warranties be made to consumers. The Rule has helped consumers purchasing used vehicles to know what they are buying, and we are currently in the process of reviewing the Rule.² The FTC has worked cooperatively with state and local authorities to enforce the Rule’s requirements. In addition to the Rule, the Commission’s primary law enforcement tool is its authority under Section 5 of the Federal Trade Commission Act,³ which the Commission has used to bring law enforcement actions against deceptive

¹ Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455 (1984).

² Used Motor Vehicle Trade Regulation Rule, Request for Public Comments, 73 Fed. Reg. 42285 (July 21, 2008). *See also* Press Release, Federal Trade Commission, FTC Approves Federal Register Notice on Regulatory Review of the Used Car Rule (July 16, 2008), available at <http://www.ftc.gov/opa/2008/07/ucr.shtm>.

³ 15 U.S.C. § 45.

advertising of car loans and deceptive lending. The Commission complements its law enforcement work with extensive consumer education and outreach to help consumers inform themselves and make better choices.

I. Getting Information About the Used Car

To make a sound decision on the purchase of a used car, a consumer should look for information about the condition and history of the car under consideration, as well as any warranty offered on the vehicle, if any, and its terms of coverage. Some necessary information is ascertainable only through an independent inspection of the car. Other helpful information about the value and safety of the car is stored in extensive databases maintained by state authorities, insurance companies, and salvage yards. The consumer also needs to know whether the car comes with a warranty to mitigate the risk of broken or damaged systems. While a great deal of information about specific cars is kept by a variety of sources, the challenge is to find efficient ways to make the information available to consumers.

A. Vehicle History Information

Information about a car's history can help consumers avoid purchasing cars that have been totaled, have sustained flood damage, have had their odometers altered, or have been bought back as "lemons" under state lemon laws. The states play an important role in collecting and putting this information into the hands of consumers. First, the states regulate car titles, and according to a recently released report from the National Association of Attorneys General ("NAAG"), "most states have laws requiring that the title be branded to show that a vehicle was previously titled as salvage, flood or rebuilt, or

with equivalent terms indicating prior damage.”⁴ Second, many states impose disclosure requirements on sellers, mandating the disclosure of damage history or the manufacturer’s repurchase of the car pursuant to a state lemon law.⁵

Disclosure and titling requirements, however, do not necessarily ensure that consumers will receive accurate information about the history of a used car.

Unscrupulous sellers can cover up a negative history by making cosmetic fixes to the car and moving the car across state lines to obtain a clean title in a different state. In some instances, insurance companies – which are well-suited to record information about the condition of cars they insure – have been charged with selling used cars that should have had their titles branded as “salvage.”⁶ Consumers who unwittingly purchase damaged vehicles suffer financial harm when they need to make repairs and when the value of their cars plummet as their history comes to light. Even more troubling are the safety risks to consumers who drive vehicles with damaged electrical or mechanical components. State oversight and enforcement are critical because this kind of deceptive suppression of negative, highly material information tends to be local in nature.⁷

Database services that gather information from state and local authorities, salvage yards, and insurance companies provide consumers with an independent and efficient means of checking a vehicle’s history and thereby avoiding many of these problems. On

⁴ Ellen Taverna, *Clearing the Road of Flood Damaged Vehicles*, NAAGAZETTE, Vol. 3, No. 1, at 3 (Feb. 18, 2009), available at <http://www.naag.org/clearing-the-road-of-flood-damaged-vehicles.php>.

⁵ *Id.*

⁶ *Id.* at 4 (noting that Iowa Attorney General Tom Miller reached a settlement with Progressive Insurance Company of Ohio).

⁷ *Id.* at 4 (stating that although automobile-related fraud cases are local in nature and rarely undertaken on a multi-state basis, the attorney generals share information regularly).

January 29, 2009, the Department of Justice announced the National Motor Vehicle Title Information System (“NMVTIS”), an online computer system intended to provide accurate information about a vehicle’s titling, odometer data,⁸ and certain damage history.⁹ The information currently is gathered from 36 states, auto recyclers, junk yards and salvage yards, and insurance carriers.¹⁰ The system went live for consumers on January 30, 2009.¹¹ This database will help consumers obtain information about vehicle history, and will help state authorities verify the history of a car before a new title is issued. In addition, the National Insurance Crime Bureau (“NICB”)¹² maintains a database that includes flood damage and other information that consumers may access for free to investigate the history of a car by its vehicle identification number (“VIN”). Commercial providers, such as CARFAX, also provide car history reports for fees ranging from \$30 to \$40.¹³ A consumer can also find out whether a car was subject to a

⁸ The Department of Justice enforces federal laws and regulations that prohibit altering an odometer with the intent to change the mileage on it and require odometer disclosure statements. *See* Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32705; Odometer Disclosure Requirements, 49 C.F.R. Part 580.

⁹ Press Release, U.S. Department of Justice, National Auto Fraud and Theft Prevention System Goes Live (Jan. 29, 2009), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/bja09020.htm>.

¹⁰ *Id.*

¹¹ *Id.* The information is available through third-party fee-for-service websites.

¹² The National Insurance Crime Bureau is a not-for-profit organization that partners with insurers and law enforcement agencies to identify, detect, and prosecute insurance fraud. <https://www.nicb.org/cps/rde/xchg/nicb/hs.xsl/79.htm>

¹³ CARFAX offers consumers the option of purchasing one report for \$29.99, 10 reports for \$34.99, and unlimited reports for 30 days for \$39.99. It may access different databases than NMVTIS, and therefore, provide different information in its reports. *See* <http://www.carfax.com>. Some consumer groups and media reports have raised concerns that these reports do not contain complete information.

safety recall from the National Highway Traffic Safety Administration (“NHTSA”),¹⁴ car manufacturers, or other sources through online searches.¹⁵ These important sources of information can help educate consumers about the history and condition of the used car they are considering purchasing.

B. The Commission’s Used Car Rule

Consumers also need information about whether the cars they are considering are covered by any warranties, and if so, the extent of the warranties and portion of repair costs, if any, the warranties cover. The FTC’s Used Car Rule prohibits dealers from misrepresenting the mechanical condition of a used car and requires them to disclose if the car is sold without any warranty, or if a warranty is offered, the terms of the warranty. The disclosures must appear on a Buyers Guide label displayed on any used cars offered for sale. The Buyers Guide is intended to counter deceptive statements in the sale of used cars, including by warning consumers that spoken promises are difficult to enforce and by encouraging them to seek independent inspections of used cars. Such inspections can alert consumers to problems with the car’s condition and, possibly, historical information about prior accidents. Between 1985 and 2000, the Commission brought more than 80 actions to enforce the Used Car Rule, and obtained civil penalty orders totaling more than \$1 million.¹⁶ In addition, hundreds of state actions have been brought to enforce

¹⁴ The NHTSA provides information about safety recalls on its website. *See* <http://www-odi.nhtsa.dot.gov/recalls>.

¹⁵ *See, e.g.*, <http://www.ford.com/owner-services/maintenance-service/recall-information>; http://www.automobilemag.com/auto_recalls/index.html.

¹⁶ Press Release, Federal Trade Commission, Sweeping Chicago’s North Shore, FTC and State Investigators Check Used Car Dealers for Required “Buyers Guides” (June 30, 2000), *available at* <http://www.ftc.gov/opa/2000/06/chicagousedcars.shtm>.

compliance with the Rule,¹⁷ and the Commission assists such initiatives with training and investigative support.

The Commission is currently conducting a periodic regulatory review of the Rule.¹⁸ Associations of automobile dealers and state law enforcers alike agree that the Buyers Guide disclosures effectively convey warranty information that is meaningful to consumers.¹⁹ Comments filed by NAAG and the International Association of Lemon Law Administrators recommend that the Rule be broadened to require disclosure of whether cars were repurchased under state lemon laws and whether there are applicable state warranties and manufacturer warranties.²⁰ State agencies also advocate mandatory disclosure of vehicle history, including any branding on the title, and prior known use of the car, such as whether it was a rental car, taxi, or other commercial vehicle.²¹ Consumer advocates urge more sweeping changes to the Rule that would increase

¹⁷ “Many states have laws or regulations that are similar to the Used Car Rule while other states incorporate the Rule by reference in their state laws. Others simply pursue violations as *per se* violations of state consumer fraud laws.” Taverma, *supra* note 4, at 5.

¹⁸ Used Motor Vehicle Trade Regulation Rule, Request for Public Comments, 73 Fed. Reg. 42285 (July 21, 2008). The Used Car Rule review is part of a continuous, comprehensive program whereby the Commission subjects each of its regulations and guides to formal scrutiny, with public comment, at least every ten years to ascertain whether the rule is still necessary and whether amendments could increase the rule’s effectiveness or lessen its compliance burden on industry. Upon the request of consumer groups, the FTC extended the comment period on the Used Car Rule review by 60 days. 73 Fed. Reg. 55458 (Sept. 25, 2008). The comment period closed on November 18, 2008.

¹⁹ Comment of NAAG, *available at* <http://www.ftc.gov/os/comments/uscdcarrule/536945-00013.htm>; Comment of National Automobile Dealers Association, *available at* <http://www.ftc.gov/os/comments/uscdcarrule/536945-00016.pdf>.

²⁰ Comment of NAAG, and Attachment A, *available at* <http://www.ftc.gov/os/comments/uscdcarrule/536945-00013.htm>.

²¹ *Id.*; Comment of Wisconsin Department of Transportation, *available at* <http://www.ftc.gov/os/comments/uscdcarrule/536945-00021.pdf>.

penalties for non-compliance and would require dealers to conduct inspections, check VINS against the NMVTIS database, and disclose additional information.²²

The Commission will give careful consideration to all comments and suggested amendments to the Rule as it determines next steps. Should the Commission commence a proceeding to amend the Rule, it will consider whether there are prevalent unfair or deceptive acts or practices that cause harm to consumers, whether the proposed disclosures would remedy that harm, and whether the benefits of amendments to the rule would exceed their cost.²³ It will also provide all interested parties with the opportunity to comment at each stage of the proceeding.

C. Consumer Education

The FTC creates and distributes consumer education materials to help meet the challenge of informing consumers about what information to gather when shopping for a used car. The Commission posts consumer education materials on its website and distributes materials to a network of “on-the-ground” partners, such as auto dealers, community banks, high schools, libraries, and other local organizations. Among other things, the FTC advises consumers to inspect used cars carefully for water damage, conduct a title search on the car, and check the car’s history in the NICB’s database of

²² Comment of Consumer Action, Consumers for Automobile Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center, U.S. Public Interest Research Group, and Watsonville Law Center, *available at* <http://www.ftc.gov/os/comments/usedcarrule/536945-00015.pdf>.

²³ The standard of review was set out in the Commission’s Credit Practices Rule, 49 FR 7740, 7742 (Mar. 1, 1984), and is based on Section 18(d)(2)(B) of the FTC Act, 15 U.S.C. 57a(d)(2)(B), which states that “[a] substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection.”

vehicles.²⁴ In its 14-page *Buying a Used Car* guide,²⁵ the agency encourages consumers to seek an independent pre-purchase inspection of the car; explains what it means to buy a car “as is” or without a warranty; describes warranties and their limitations; and suggests options consumers may pursue if they experience problems after the purchase. Because the inspection is such an important part of the purchase, the guide advises consumers on the difference between a safety inspection and a mechanical inspection, describes how to find certified inspectors, and suggests options if a dealer will not allow the consumer to remove the car from the lot.²⁶ Since 2004, the Commission has distributed more than 175,000 guides in English or Spanish, and, in addition, the information was accessed online approximately 144,000 times.

II. Financing the Purchase of the Car

Consumer evaluations of what they can afford to purchase are guided in large part by the payment and financing terms of available loans. Deceptive practices in the sale or marketing of loans can cost consumers thousands of dollars, and in some cases, threaten their ability to repay the loans. Deceptive loan practices can take many forms, including misrepresentations about the terms of the loans, concealment of interest rates, fees, and other charges, and “packing” loans with unwanted products. Because loan terms and paperwork are often opaque to consumers, the challenge for consumer protection law

²⁴ Federal Trade Commission, Hurricane Recovery: Automobiles, *available at* http://www.ftc.gov/bcp/edu/microsites/recovery_hurricane/consumer_info.html#auto.

²⁵ Federal Trade Commission, *Buying a Used Car* (June 2008), *available at* <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut03.pdf>.

²⁶ The agency also engages in business education, and several years ago, formed a partnership with the National Independent Automobile Dealers Association to print and distribute *A Dealer’s Guide to the Used Car Rule*.

enforcement agencies is to identify deceptive or otherwise unlawful lending practices, and to use multiple strategies to combat them.

The Commission brought 29 cases challenging deception in the advertising of finance or lease terms for cars between 1990 and 2000.²⁷ These cases involved car manufacturers, dealerships, and advertising agencies, and the FTC alleged that these entities made bold promotions of low costs or terms that omitted or buried key costs, or that misrepresented the terms available to consumers.²⁸

According to the Commission's complaints, in some instances advertisements emphasized low monthly payments, and omitted or failed to conspicuously disclose huge

²⁷ See *In re Simmons Rockwell Ford Mercury, Inc* ("Simmons Rockwell"), FTC Docket No. C-3950 (Apr. 27, 2000); *In re R.N. Motors, Inc.* ("R.N. Motors"), FTC Docket No. C-3947 (Apr. 27, 2000); *In re Dunphy Nissan, Inc.* ("Dunphy"), FTC Docket No. C-3924 (Feb. 7, 2000); *In re Northeast Auto Outlet, Inc.* ("Northeast"), FTC Docket No. C-3925 (Feb. 7, 2000); *In re Marty Sussman Organization, Inc.*, FTC Docket No. C-3923 (Feb. 7, 2000); *In re Norristown Automobile Co., Inc.*, FTC Docket No. C-3922 (Feb. 7, 2000); *In re Pacifico Ardmore, Inc.*, FTC Docket No. C-3920 (Feb. 7, 2000); *In re Pacifico Ford, Inc.*, FTC Docket No. C-3921 (Feb. 7, 2000); *In re Chrysler Corp.* ("Chrysler"), FTC Docket No. C-3847 (Jan. 4, 1999); *In re Bozell Worldwide Inc.* ("Bozell"), FTC Docket No. 3845 (Jan. 4, 1999); *In re Martin Advertising, Inc.* ("Martin"), FTC Docket No. C-3846 (Jan. 4, 1999); *In re Grey Advertising, Inc.* ("Grey"), FTC Docket No. C-3793 (Apr. 6, 1998); *In re Foote, Cone, and Belding Advertising, Inc.* ("Foote Cone"), FTC Docket No. C-3792 (Apr. 6, 1998); *In re Rubin Postaer and Associates, Inc.* ("Rubin Postaer"), FTC Docket No. C-3794 (Apr. 6, 1998); *In re Toyota Motor Sales, U.S.A., Inc.*, FTC Docket No. C-3776 (Jan. 5, 1998); *In re Volkswagen of America, Inc.*, FTC Docket No. C-3778 (Jan. 5, 1998); *In re Bommarito Oldsmobile, Inc.* ("Bommarito"), FTC Docket No. C-3774 (Jan. 5, 1998); *In re Beuckman Ford, Inc.*, FTC Docket No. C-3777 (Jan. 5, 1998); *In re Suntrup Ford, Inc.* ("Suntrup"), FTC Docket No. C-3779 (Jan. 5, 1998); *In re Lou Fusz Automotive Network, Inc.* ("Lou Fusz"), FTC Docket No. C-3780 (Jan. 5, 1998); *In re Herb Gordon Auto World, Inc.* ("Herb Gordon"), FTC Docket No. C-3734 (Apr. 15, 1997; corrected Apr. 18, 1997); *In re Huling Bros. Chevrolet, Inc.* ("Huling"), FTC Docket No. C-3732 (Apr. 14, 1997); *In re General Motors Corp.* ("General Motors"), FTC Docket No. C-3710 (Feb. 6, 1997); *In re American Honda Motor Co.* ("Honda"), FTC Docket No. C-3711 (Feb. 6, 1997); *In re Mazda Motor of America, Inc.* ("Mazda"), FTC Docket No. C-3714 (Feb. 6, 1997); *In re Mitsubishi Motor Sales of America, Inc.* ("Mitsubishi"), FTC Docket No. C-3713 (Feb. 6, 1997); *In re American Isuzu Motors, Inc.* ("Isuzu"), FTC Docket No. C-3712 (Feb. 6, 1997); *In re Jerry's Ford Sales, Inc.* ("Jerry's Ford"), FTC Docket No. C-3612 (Aug. 29, 1995; corrected Sept. 15, 1995); *In re Collins Buick, Inc.* ("Collins"), FTC Docket No. C-3426 (May 10, 1993). These cases were resolved by consent agreements.

²⁸ The Commission has also obtained civil penalties for violations of certain lease or credit advertising orders. See *United States v. Mazda Motor of America, Inc.*, No. SACV-99-1213 AHS (C.D. Cal. Oct. 7, 1999) (Consent Decree); *United States v. Suntrup Buick-Pontiac-GMC Truck, Inc.*, No. 4:99CV01746CEJ (E.D. Mo. Nov. 22, 1999) (Consent Decree).

balloon payments or additional monthly payments in much higher amounts.²⁹ In others, ads highlighted specific financing rates, when the true rates were much higher.³⁰ Certain ads either did not disclose other key cost terms or hid them in fine or virtually illegible print, in inaudible audio, or obscured by music, or images.³¹ Some ads misrepresented that consumers could purchase a vehicle by making low monthly payments or other terms, when, in fact, the offers were for leases.³² The Commission also charged advertising agencies that created and disseminated the challenged lease or credit advertisements.³³ On the national level, car manufacturers' advertisements appear to have improved as a result of these efforts.

Some consumer advocates have warned of emerging problems in the financing of used cars.³⁴ Dealers may raise customer interest rates on the pretext that the previously agreed upon terms are no longer available, a practice known as "yo-yo financing." Dealers may falsify loan documents, or sell and finance vehicles but then fail to pay off the dealers' existing debt on the vehicle, leaving consumers in debt and in danger of having their newly purchased cars repossessed. These reported practices are troubling and some may indicate criminal fraud. The Commission will continue to gather

²⁹ *General Motors; Mitsubishi; Jerry's Ford; Herb Gordon; Collins, supra* note 27.

³⁰ *Jerry's Ford; Huling, supra* note 27.

³¹ See e.g., *Mazda; General Motors; Honda; Mitsubishi; Isuzu; Lous Fusz; Bommarito; Suntrup; Dunphy, supra* note 27.

³² *Dunphy; Northeast, supra* note 27.

³³ See *Grey; Foote Cone; Rubin Postaer; Bozell; Martin, supra* note 27.

³⁴ See Letter from Consumers for Auto Reliability and Safety, the National Consumers League, the National Association of Consumer Advocates, and Consumer Action to the Honorable Nancy Pelosi (December 3, 2008).

information about such practices and evaluate whether specific instances of fraud merit the attention of our state partners or independent federal action.

In addition to its enforcement work, the Commission has created materials to help educate consumers on how to shop for loans on cars, most notably a guide entitled *Understanding Vehicle Financing*.³⁵ The FTC makes this guide available in English and Spanish on the FTC's website.

III. Keeping the Car

In troubled financial times, consumers may find themselves in need of emergency loans that they secure with their cars. Others may find themselves owing more on their car loans than their cars are actually worth. These circumstances can lead to a cycle of debt that jeopardizes consumers' ability to keep their cars.

A. Car Title Loans

Consumers in the subprime credit market who own cars and need emergency cash may resort to car title loans. Like payday loans, car title loans are short-term, high-interest loans -- in this case, secured by title to the borrower's car.³⁶ Although the loans are made for relatively small amounts -- often a few hundred dollars -- the car that secures the loan typically has a much greater value. Because the loans are fully secured, title lenders can make loans without evaluating the borrower's ability to repay the debt. Annualized interest rates are extremely high. For example, a 2005 study of Illinois title

³⁵ Federal Trade Commission, *Understanding Vehicle Financing* (March 2007), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut04.pdf>.

³⁶ Title lenders may also refer to such loans as "sales and leasebacks," "title pawns," or "motor vehicle equity lines of credit" in an effort to evade usury laws. Amanda Quester & Jean Ann Fox, The Center for Responsible Lending and The Consumer Federal of America, *Car Title Lending: Driving Borrowers to Financial Ruin*, at 11 - 12 (April 14, 2005).

lenders found annual percentage rates averaging a troubling 256 percent.³⁷ Furthermore, according to a report released by the Tennessee Department of Financial Institutions, some lenders charge interest rates well in excess of what applicable state law allows and charge fees that are not permitted under applicable state law, such as late fees, lien recording fees, repossession fees, application fees, renewal fees, trip charges, and storage fees.³⁸

The high interest and fee charges can make full repayment by the due dates of the loans unaffordable. A borrower in these circumstances has little choice but to make interest payments and roll-over (or renew) the balance of the loan into a new loan with, of course, additional fees.³⁹ As the fees mount, it becomes increasingly difficult to pay off the principal balance. By the time their loans are ultimately repaid, some borrowers have paid several times the original loan amounts.⁴⁰ Other borrowers find that they simply cannot reduce their principal balances, and end up having their cars repossessed even after making payments in excess of the original loan amounts.⁴¹

Because some state laws limit interest rates or certain fees and charges, state agencies play a key role in protecting consumers by examining loan documentation for unauthorized charges. In addition, the Commission has used its authority under the FTC

³⁷ Woodstock Institute and The Public Auction Foundation, *Debt Detour: The Automobile Title Lending Industry In Illinois*, at 2 (Sept. 2007), available at <http://www.responsiblelending.org/pdfs/debt-detour.pdf>. The report was based on a study of loans in default, not all loans made.

³⁸ Tennessee Department of Financial Institutions, Report to the Tennessee General Assembly. Pursuant to Public Chapter 440, Acts of 2005, Section 7(e), at 6 (Feb. 1, 2006).

³⁹ *Id.* at 6 (compiling survey results showing that Tennessee car title lenders on average renewed loans 7 times); Quester & Fox, *supra* note 36, at 6.

⁴⁰ Quester & Fox, *supra* note 36, at 6 – 7.

⁴¹ *Id.*

Act to challenge deception in the sale of small-money loans secured by car titles.⁴² The Commission remains alert to allegations that title loan companies use deception to victimize borrowers, and as always, welcomes information from consumers, state agencies, and consumer advocates to help identify law breakers.

B. Negative Equity and Repossession

According to some consumer groups with expertise in this area,⁴³ consumers are facing a credit crunch on their car loans. Simply put, some consumers owe more money on their loans than their cars are worth.⁴⁴ This negative equity problem means that consumers who trade in used cars are rolling their debt into their next vehicle purchases, thus digging themselves deeper and deeper into debt.

The Commission uses all the tools at its disposal to increase its protection of consumers who fall into debt. The FTC brings law enforcement actions against those who engage in unfair or deceptive acts and practices in violation of Section 5 of the FTC Act,⁴⁵ as well as against violators of specific credit statutes, such as the Fair Debt

⁴² For example, the Commission sued Stewart Finance Company in 2003, charging it with (1) deceptively packing costly products, such as auto club memberships, into loans secured by the borrower's car; (2) deceiving consumers into taking out costly renewal loans; and (3) failing to make accurate disclosures under the Truth In Lending Act. *FTC v. Stewart Finance Company*, No. 1:03 CV 2648-JTC (N.D. Ga. Sept. 2003), <http://www.ftc.gov/opa/2003/09/stewart.shtm>. Similar charges, alleged in an administrative complaint against The Money Tree, were settled in 1997. *In Re The Money Tree*, FTC Docket No. C-3735 (April 28, 1997), <http://www.ftc.gov/opa/1997/02/tree3.shtm>.

⁴³ See Letter from Consumers for Auto Reliability and Safety, et al., *supra* note 34 (citing a report from J.D. Power and Associates Power Information Network, and articles in the Los Angeles Times and Automotive News).

⁴⁴ *Id.*

⁴⁵ For example, in the past year, the Commission has brought six cases targeting mortgage foreclosure rescue scams, including a case filed in February. *FTC v. National Foreclosure Relief, Inc.*, No. SACV09-117 (C.D. Cal. Feb. 2, 2009); *FTC v. National Hometeam Solutions, LLC*, No. 4:08-cv-00067 (E.D. Tex. Feb. 26, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-00388 (M.D. Fla. Feb. 5, 2008); *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio Apr. 28, 2008); *FTC v. United Home*

Collection Practices Act and the Credit Repair Organizations Act. Since 1999, the FTC has brought 21 lawsuits for illegal debt collection practices and 42 cases against defendants that allegedly misrepresented the credit-related services they would provide. Most recently, in October 2008, the Commission and 24 state agencies announced a crackdown on 33 credit repair operations – entities that allegedly made deceptive claims that they could remove negative information from consumers' credit reports, even if that information was accurate and timely. The agency also distributes extensive consumer education materials about debt collection, debt relief services, credit repair, and related topics to help consumers in financial distress take steps to protect themselves.⁴⁶ Most notably, the Commission distributes a guide on vehicle repossession that explains how repossession work and the rights of creditors and consumers.⁴⁷ Since fiscal year 2004, we have distributed more than 173,000 guides to local organizations, such as schools, legal services offices, credit counseling agencies, among others, and during this period, this information has been accessed on our website more than 300,000 times.

CONCLUSION

Consumers in the market for used cars face challenges as they try to make sound purchasing and financing decisions. They need access to reliable information about the condition and history of the car, as well as financing packages that contain all required

Savers, LLP, No. 8:08-cv-01735 (M.D. Fla. Sept. 3, 2008); *FTC v. Safe Harbour Foundation of Florida, Inc.*, 08 C 1185 (N.D. Ill. Feb. 27, 2008).

⁴⁶ Numerous consumer education publications for consumers are posted on the FTC website on a page labeled "In Debt" and are available in print from a variety of sources. See <http://www.ftc.gov/bcp/menus/consumer/credit/debt.shtm>.

⁴⁷ Federal Trade Commission, Vehicle Repossession: Understanding the Rules of the Road (Nov. 2008), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut14.pdf>.

disclosures and are free of deception. Equally important, consumers in need of emergency loans who are considering borrowing against their cars need accurate information about the costs and terms of offered loans, so that they can make fully informed decisions about the risks of the debt. Through targeted law enforcement, partnerships with state and federal law enforcement authorities, increased vigilance on emerging practices, and consumer education, the Commission will work with the Committee to continue to help consumers avoid the pitfalls in the used car marketplace.

Mr. RUSH. The chair now will recognize Mr. Burch for the purposes of opening statement. Please limit your comments to 5 minutes.

TESTIMONY OF JAMES H. BURCH, II

Mr. BURCH. Mr. Chairman, Ranking Member Radanovich and other distinguished members of this subcommittee, I am pleased to have the opportunity to discuss with you today the Department of Justice's efforts to protect consumers from fraud and unsafe vehicles through the National Motor Vehicle Title Information System, what we call NMVTIS. We appreciate this subcommittee's interest in consumer protection by preventing auto theft and fraud.

Fraud involving vehicles is a profitable business for criminals and one that burdens States, the auto industry, insurers and consumers. According to estimates in the 2007 Uniform Crime Reports from the FBI, there were 1.1 million vehicles stolen nationwide. The National Insurance Crime Bureau reports that auto theft alone costs consumers and insurance companies nearly \$8 billion per year. In an effort to combat automobile theft and fraud, NMVTIS was established by Congress in 1992. In 1996, by amendment, Congress moved responsibility for NMVTIS from the U.S. Department of Transportation to the Department of Justice because of the Department's overall goal of reducing theft and fraud.

NMVTIS enables users to access automobile titling information including brand history and certain historical theft data through a web-based system. It also facilitates the electronic exchange of information between States, which improves titling efficiency and reduces fraud. This exchange of information is particularly helpful in combating vehicle identification number, or VIN, cloning and title washing, which are significant problems and growing trends in the United States. By making available in one system specific pieces of information from motor vehicle titling agencies, automobile recyclers, junk and salvage yards and insurance carriers across State lines, NMVTIS protects States and consumers from fraud and unsafe vehicles.

In January 2009, the Department announced the availability of the National Motor Vehicle Title Information System specifically for consumers. The system provides the public with valuable information about a vehicle's condition and history and helps consumers make informed car buying decisions. Through NMVTIS, once a vehicle is titled or branded by a State motor vehicle titling agency or is determined by an insurance carrier to be salvage or total loss, that data and other important information becomes a permanent part of the vehicle's NMVTIS record. The law requires that the operation of the system be paid for through user fees and not dependent on federal funding. Therefore, NMVTIS is designed as a fee-for-service system. Prior to purchasing a vehicle, a consumer can access NMVTIS through an authorized third-party provider and view information such as the most recent odometer reading, the brand history for that vehicle, the history of any salvage or total-loss determinations, and other historical data including theft data. While authorized providers may charge a fee for their service, consumers benefit from these services that are market driven, and as of today do not cost more than \$3.50 per successful VIN search.

In addition to providing information to individual consumers, the law requires that NMVTIS information be made available consistent with relevant privacy laws to other prospective purchasers such as businesses that purchase used automobiles or other commercial consumers. Commercial consumers include lenders who are financing the purchase of automobiles and automobile dealers. Lenders, dealers and insurance carriers are integral components of the automobile purchasing and titling process and their ability to avoid fraud then protects individual consumers as well.

NMVTIS also serves as a powerful tool for law enforcement. With access to this system for the first time, law enforcement will have direct access to State motor vehicle data in near real time. Previously law enforcement had to contact individual State motor vehicle titling agencies by phone during business hours to track down title data. With access to NMVTIS 24/7, law enforcement agencies will be able to better identify stolen motor vehicles, enhance their ability to detect vehicle theft rings and combat other criminal enterprises that use vehicles. In research conducted at the request of DOJ, NMVTIS estimated to save taxpayers between \$4 billion and \$11 billion each year. When fully implemented, NMVTIS will have data from every State and will be queried before any State issues a new title for vehicles coming in from another State. In addition, the system will be available for queries before a prospective purchaser buys any used vehicle. These efforts will protect the American public from title fraud, keep stolen vehicles from being fraudulently retitled and will make it more difficult, if not impossible, for criminals to clone or conceal stolen vehicles for criminal purposes.

This concludes my statement, Mr. Chairman. Thank you for the opportunity to testify today. I welcome the opportunity to answer any questions you or members of the subcommittee may have.

[The prepared statement of Mr. Burch follows:]



Department of Justice

STATEMENT OF

JAMES H. BURCH, II
ACTING DIRECTOR
BUREAU OF JUSTICE ASSISTANCE
OFFICE OF JUSTICE PROGRAMS
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE,
TRADE, AND CONSUMER PROTECTION

HEARING ENTITLED

"CONSUMER PROTECTION IN THE USED AND SUBPRIME CAR MARKET"

PRESENTED

MARCH 5, 2009

Mr. Chairman, Ranking Member Radanovich and Members of the Subcommittee: I am pleased to have the opportunity to discuss the Department of Justice's (DOJ) efforts to protect consumers from fraud and unsafe vehicles through the National Motor Vehicle Title Information System (NMVTIS). We appreciate this Subcommittee's interest in consumer protection and motor vehicle safety.

My name is Jim Burch and I am the Acting Director of the Bureau of Justice Assistance (BJA) of the Office of Justice Programs (OJP) within DOJ. BJA's mission is to provide leadership and services in grant administration and criminal justice policy development to support local, state, and tribal justice strategies to achieve safer communities. I have served in OJP for more than 14 years and prior to my appointment as the Acting Director, I served as the Deputy Director for Policy at BJA. The Policy Office focuses on state and local justice issues including law enforcement, information sharing, the courts, community and institutional corrections, drug policy and substance abuse, tribal justice, and crime prevention. The Policy Office also acts as a liaison to national organizations that partner with BJA to guide local justice policy and help disseminate information on best and promising practices.

Today, Mr. Chairman, I would like to discuss the National Motor Vehicle Title Information System which is administered by BJA in coordination with the Federal Bureau of Investigation (FBI). In my testimony, I will show how BJA is working with state motor vehicle titling agencies to improve titling efficiency and reduce fraud; protecting consumers from fraud and unsafe vehicles; and aiding law enforcement in reducing crime involving vehicles, such as vehicle theft rings, smuggling, and fraud.

History of NMVTIS

Fraud involving vehicles is a profitable business for criminals and one that burdens consumers, states, and the auto industry as well as insurers. According to estimates in the Uniform Crime Report, in 2007 there were 1.1 million vehicles stolen nationwide. The estimated value of vehicles stolen in 2007 was \$7.4 billion, which averages \$6,755 per stolen vehicle. According to the National Insurance Crime Bureau, auto theft alone costs consumers and insurance companies nearly \$8 billion per year and only 63 percent of vehicles reported stolen are recovered.

The creation of false vehicle identification numbers (VIN) (VIN Cloning) or titling a vehicle in a state that does not recognize another state's "branding" information (Title Washing) are growing trends. VIN cloning is a crime in which stolen vehicles assume the identity of non-stolen, legally owned vehicles that are similar in make and model. We do not know the exact extent of VIN cloning in the United States today, however our partners in the FBI and others in the auto industry believe it is very significant and our partners in state and local law enforcement tell us that it is nearly impossible today to detect a cloned vehicle that has been "legitimately" re-titled. In fact, there are cases where even car dealers themselves have unknowingly purchased cloned vehicles for resale. Title washing allows individuals to remove salvage and other brands from car titles by re-titling the vehicle in a state that doesn't recognize the brand or simply removing the brand from the paper title and titling the vehicle in a state that has no reliable way of knowing of the brand's existence in another state. A "brand" is a descriptive label assigned to a vehicle by a state that identifies the vehicle's current or prior condition, such as "junk,"

“salvage,” “rebuilt” or “flood.” Experian Automotive reported in August 2008 that in the first six months of 2008 there were more than 185,000 titles that were initially branded in one state, and then transferred and re-titled in a second state in a way that resulted in the issuance of a purportedly clean title. Clear links have also been established between auto theft and major crimes, violent crime, organized crime, and transnational criminal activity. Vehicles are a valuable commodity in funding criminal organizations.

In an effort to combat automobile theft and fraud, NMVTIS was established by federal law in 1992. In 1996, an amendment moved responsibility for NMVTIS from the U.S. Department of Transportation to DOJ. Since 1992 and continuing today, the American Association of Motor Vehicle Administrators (AAMVA) operates NMVTIS on behalf of DOJ, consistent with the provisions of the Anti-Car Theft Act. NMVTIS enables users to access automobile titling information, including brand history and certain historical theft data, through a web-based system. It also facilitates the electronic exchange of information between states, which improves titling efficiency and reduces fraud. This exchange of information is particularly helpful in combating VIN cloning and title washing. By making available in one system specific pieces of information from all motor vehicle titling agencies, automobile recyclers, junk and salvage yards, and insurance carriers in the United States, NMVTIS protects consumers and states from fraud and unsafe vehicles. In fact, NMVTIS can be nearly 100 percent effective in preventing the VIN cloning schemes we see today and can be similarly effective in preventing title washing.

Since 1997 the Department of Justice has committed over \$15 million to assist states and other stakeholders in the implementation of NMVTIS. During Fiscal Years 2007-2009, DOJ issued competitive funding solicitations, offering states the ability to apply for direct funding from DOJ to participate in and fully implement NMVTIS. We have also encouraged states to consider applying for funds through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, and have encouraged and funded state applications submitted under the Edward Byrne Discretionary Grants Program.

Between April 2007 and 2008, BJA and FBI hosted feedback sessions and conference calls with law enforcement, consumer groups, and others regarding NMVTIS and plans for full implementation. In January 2009, DOJ published the final regulatory guidelines for NMVTIS, which outline the various responsibilities and reporting requirements for states, auto recyclers, junk yards and salvage yards, and insurance carriers. These rules also spell out the manner in which consumers (both individual consumers and commercial consumers) can access the information needed to make an informed purchasing decision. Currently, NMVTIS has the participation, or partial participation, of 27 states, which represent nearly 75 percent of the U.S. vehicle population. In addition, 10 states are currently developing the technological means to participate soon in NMVTIS. All states must be fully participating in NMVTIS as required by the Act and its regulations by January 1, 2010. The Department is committed to continuing to work collaboratively with states to help bring them into full compliance with the Act.

Assisting States

NMVTIS is designed to assist, and provide benefits to states, particularly state motor vehicle titling information agencies. States that fully participate in NMVTIS are able to instantly check all state vehicle title information included in the system to verify the accuracy and legitimacy of the information being presented to title clerks in motor vehicle agencies. This instant search protects states and consumers from crime and fraud, and saves titling agencies processing time because the process is automated. NMVTIS, with support from AAMVA, also provides a secure communication link among state motor vehicle titling agencies, allowing the titling agency to securely check the title information of the current state of title and subsequently to securely notify that state of the vehicle's new location and the issuance of a new title. Through NMVTIS, states also have access to other states' actual titles of record, including restricted information only available to state motor vehicle titling agencies. This allows and supports automation of state-to-state electronic title transactions. In these cases, the verification and the title transaction can be conducted in the same place at the same time, as opposed to having to check a private vehicle history database and then undertake a manual state-to-state title transaction. Additionally, the system will provide states with unlimited access to insurance carrier, and junk and salvage yard information reported on vehicles that they may be titling or have already titled.

NMVTIS has produced many promising results for state motor vehicle titling agencies, including time and cost savings for states, reductions in customers' wait time, decreases in motor vehicle thefts and improved recovery rate of stolen vehicles, increased ability to identify cloned

vehicles prior to title issuance, and improved investigative abilities. For example, according to AAMVA, South Dakota and New Hampshire have reported saving time and money by no longer requiring the motor vehicle agency clerk to manually update a state record with returned title information since such updates are automatically included in NMVTIS. Arizona has realized a reduction in customer wait time and the ability to identify problems upfront due to instantaneous accurate data online. In addition, Arizona reported a substantially improved recovery rate on vehicles identified as stolen since NMVTIS implementation. Virginia reported a 17 percent decrease in motor vehicle thefts. Florida cracked a car theft ring responsible for cloning more than 250 vehicles around the U.S., valued at \$8 million. Indiana experienced a reduction in lawsuits by consumers who were given “clear titles” with missing brands. These benefits realized by the states are also passed on to consumers in time and cost savings.

Protecting Consumers

On January 30, 2009, the Department announced the availability of NMVTIS specifically for consumers. This system provides the public with valuable information about a vehicle’s condition and history and helps consumers make informed car-buying decisions. Through NMVTIS, once a vehicle is titled or branded by a state motor vehicle titling agency or is determined by an insurance carrier to be “salvage” or “totaled,” that data, and other important information, becomes a permanent part of the vehicle’s NMVTIS record. The law requires that operation of the system be paid for through user fees and not dependent on federal funding, therefore, NMVTIS is designed as a fee-for-service system. Prior to purchasing a vehicle, a consumer can access NMVTIS through an authorized third-party provider and view information

such as the most recent odometer reading, brand history, history of a salvage or total loss determination, and historical theft data. Consumers are also offered the ability to be connected to the current state-of-record website to facilitate access to the full title record, if available and if desired by the consumer. While any organization, including a non-profit or a governmental agency, is eligible to become an authorized provider, all providers must meet certain requirements or standards that are designed to protect consumers, such as use of a DOJ-approved product disclaimer developed in coordination with consumer advocacy groups. While authorized providers may charge a fee for their service, consumers benefit from these services that are market-driven and, as of today, do not cost more than \$3.50 per successful VIN search. We are currently exploring options with these providers and others to provide purchase options that do not require payment by credit card and to provide services other than over the Internet. We recognize through our dialogue with consumer advocacy organizations that not all consumers have access to credit or electronic media.

In addition to providing information to individual consumers, the law requires NMVTIS information to be made available to other prospective purchasers, such as businesses that purchase used automobiles or other commercial consumers. Commercial consumers include lenders who are financing the purchase of automobiles (and in many cases actually own them as the lien holders) and automobile dealers. Lenders, dealers, and insurance carriers are integral components of the automobile purchasing and titling process, and their ability to avoid fraud protects individual consumers as well. Although these commercial entities may access NMVTIS today, DOJ has authorized AAMVA to establish specialized access methods for these entities

that would enable them to query multiple VINs simultaneously and to access the information needed for commerce so long as such access is consistent with relevant privacy laws.

Nearly 75 percent of the U.S. vehicle population is currently in NMVTIS and more than half of the states report data to the system. The remaining states must begin reporting before January 1, 2010. Similarly, insurance carriers and junk and salvage yards are required to begin reporting by March 31, 2009. Until all entities are reporting into NMVTIS as required, consumers should be aware of the possibility that a search may not provide key information that would be useful in making a purchase decision. This is no different than the gaps that may exist in other, private vehicle history databases that collect data on a voluntary or purchase basis, and consumers should educate themselves on these issues as well.

In addition, consumers should be aware that NMVTIS data comes from multiple sources. These sources, such as states, are not required to follow or prescribe to a uniform approach for defining vehicle conditions and titling. For example, because a vehicle has been in the possession of a junk or salvage yard, does not mean that every state will brand the vehicle as junk or salvage. State laws vary in this regard and may result in application of different brand, or may not require application of any brand at all, despite the fact that the vehicle was determined to be salvage by an insurance carrier, for example. The bottom line is that the standards governing these matters vary from jurisdiction to jurisdiction.

Similarly, an insurance carrier's determination of "total loss" does not necessarily mean that a vehicle was destroyed or is worthless. For instance, a stolen vehicle that is not recovered

within a 30-day time period may be labeled by an insurance company as a “total loss”. However, the vehicle may be recovered later in good condition and the “total loss” determination may not be removed. The insurance company, or an auction company or “pool,” may sell the vehicle in perfectly good working order, despite having been labeled as a “total loss.” DOJ has encouraged insurance carriers to report the reason for their total loss determinations so that in such instances, consumers can be made aware of the reasons, and use this information in their purchasing decisions.

Consumers should be aware that the information in NMVTIS is not all of the information that a state may include in its vehicle title records. For example, some state records may include inspection histories, owner information, or data concerning vehicle damage history, including the estimated value of the damage. Consumers are encouraged to consider accessing the actual state title record to ensure that all relevant information is considered before making a vehicle purchasing decision.

Assisting Law Enforcement in Preventing Crime

NMVTIS also serves as a powerful tool for law enforcement to deter trafficking in stolen vehicles by strengthening efforts against auto theft and fraud, including the export of stolen vehicles and the purchase of junk vehicles with clean titles for purposes of cloning. With access to NMVTIS, for the first time, law enforcement will have direct access to state motor vehicle data in near real time; previously, law enforcement investigators had to contact individual state departments/bureaus of motor vehicles by phone during their business hours to track down title

data. Additionally, NMVTIS will provide law enforcement with 24/7 direct access to important investigative pieces of information such as odometer readings and vehicle title and brand history. With access to NMVTIS, law enforcement agencies will be able to better identify stolen motor vehicles, enhance their ability to detect vehicle theft rings and cases of public corruption, and combat other criminal enterprises involving vehicles. Law enforcement agencies will have access to NMVTIS through the secure Regional Information Sharing System (RISS), a key DOJ partner, by Spring 2009.

Conclusion

In research conducted by the Logistics Management Institute at the request of DOJ, NMVTIS is estimated to save taxpayers between \$4 and \$11 billion each year. According to law enforcement and insurance crime experts, in the wake of Hurricane Katrina, authorities reported truckloads of flooded vehicles being taken out of Louisiana to other states as far away as the upper Midwest, where they were dried out, cleaned, and readied for sale to unsuspecting consumers in states that do not brand flood vehicles. Prospective purchasers of these vehicles may not have known the vehicles had been subjected to a saltwater flood that made the vehicles' electrical systems, including their airbag sensors, prone to failure. NMVTIS is designed to prevent vehicle histories such as these from being concealed from consumers because it captures into one system specific pieces of information from state motor vehicle titling agencies, automobile recyclers, junk and salvage yards, and insurance carriers. The system also provides law enforcement with an important tool to reduce auto theft and vehicle-title-related crimes.

With full participation from all 50 states and the District of Columbia, NMVTIS can prevent stolen motor vehicles, including clones and vehicles with washed titles from entering into interstate commerce. Ultimately, NMVTIS will have data from every state and will be queried before any state issues a new vehicle title and before a prospective purchaser buys any used vehicle. These efforts will protect the American public from title fraud, keep stolen vehicles from being fraudulently re-titled, and will make it more difficult, if not impossible, for criminals to clone or conceal stolen vehicles for criminal purposes.

This concludes my statement, Mr. Chairman. Thank you for the opportunity to testify today. I welcome the opportunity to answer any questions you or Members of the Subcommittee may have.

Mr. RUSH. The chair thanks the gentleman. Now, Ms. Shahan is recognized for 5 minutes of opening statement.

TESTIMONY OF ROSEMARY SHAHAN

Ms. SHAHAN. Thank you, Chairman Rush and Ranking Member Radanovich and distinguished members of the committee. I really appreciate the invitation to testify today. I am very grateful to you and to your staff for the work that you have been doing on this issue.

For 30 years, since 1979, I have been working on behalf of consumers at the State and Federal level and I hear from consumers who have car problems on a daily basis. We have members who have had car problems. We have members who have lost children because they were in unsafe cars. Representative Schakowsky referred to the Ellsworths, who are members of CARS, whose son Bobby was killed for lack of an airbag, and they asked that a letter that they wrote to Governor Schwarzenegger be admitted. I would request from the chair and the committee that we would submit their letter for the record.

Mr. RUSH. Hearing no objection, so ordered.
[The information follows:]

February 2, 2009

The Honorable Arnold Schwarzenegger
Governor, State Capital
Sacramento, CA 95814

Re: National Motor Vehicle Title Information System, California Department of Motor Vehicles

Dear Governor Schwarzenegger,

I am writing you this letter as an urgent request from a concerned California citizen and father whose son was killed in a salvage vehicle with no working airbags. In 2007, my son Bobby, who was 18, was killed in a tragic vehicle crash. He was riding as a passenger in a truck that had been totaled by State Farm Insurance Company, then sent to an auction. The air bags had deployed. The truck was purchased by an unscrupulous rebuilder who failed to replace the air bags. Instead, he cut corners and did not pay for replacement air bags. He glued the air bag covers back together to conceal the fact the air bags were missing.

When I learned that my son's death could have been prevented if the vehicle he was in had a working airbag, I vowed to fight for changes needed in the law so this tragic event would never happen again. My family's story has been told in Reader's Digest and was been reported by NBC News, ABC News, and other national media, as we continue to alert the public about the hidden hazards of salvage vehicles and missing air bags.

I was elated to see that the U.S. Department of Justice is moving forward with the creation of a national database, the National Motor Vehicle Title Information System (NMVTIS) to track salvaged vehicles, particularly since California titles more of these vehicles than any other state. However, my elation soon turned to disappointment when I discovered that the California Department of Motor Vehicles was restricting access to the database, barring the public from being able to access California's data via NMVTIS.

This is totally unacceptable to me and a serious threat to public safety. My urgent request to you, Governor Schwarzenegger, is not to delay this program designed to save lives and save the public billions each year, but rather to expedite its release to the public. The formation and dissemination of this database in a timely manner could have saved my son's life. Please, let's not lose another life to unnecessary delays.

Sincerely,

Robert J. Ellsworth
2851 Echo Valley Road
Jamul, CA 91935

Ms. SHAHAN. Thank you very much.

Their letter asks the governor to ensure that California fully participates in the National Motor Vehicle Title Information System, or NMVTIS, and California with some prodding has begun to participate in NMVTIS but it is restricting access to the information to the public, and that is a problem. We believe that it is illegal. We were among the consumer groups including Public Citizen and Consumer Action that sued the Department of Justice because after so many years the Anti-Car Theft Act had not been implemented and people need it desperately. We need this information more now than we ever have before and we were very grateful that Judge Patel in San Francisco ruled in our favor and ordered the DOJ—we saw it actually as a rather friendly lawsuit—ordered the DOJ to issue the final rules, which it did, and starting the end of this month for the first time ever, the insurance industry and the salvage pools and junkyards will be submitting data to the title system and it will be made available to the public and competitive forces can then come into play. The cost of accessing the information can come into play. In our comments to the FTC, we along with other consumer groups asked that the information also be included on the used car buyer's guide so that consumers who don't have access to computers when they are car shopping or for other reasons may not have access to credit in order to get the information from the database will be able to get it on the car at the time of purchase. According to the National Highway Traffic Safety Administration, which commissioned an Academy of Sciences study on where car information is most useful, they said absolutely, you know, put it on the car. We have the five-star ratings on cars, the EPA ratings are on cars. That is where people want it. That is where it does the most good and we are hoping that we can achieve that with Congress's help.

Let me just say this. Since I have been doing this for 30 years, the irony we face now is that new cars have never been better. We have the best cars that are being manufactured. We are best known for initiating California's Lemon Law. That was back in the days of the Plymouth Volare, which, you know, was falling apart bolt by bolt. The cars are better than ever before but the sales practices are worse than ever before, and not only do we have problems with things like yoyo financing and, you know, very creative ways of ripping consumers off over their car loans, and I would like to note for the record that there is a victim of yoyo financing who is here from Virginia, who typifies what happens. When she purchased the car, she thought she had a deal and about a month later she heard from the dealer who said you have to bring the car back, and if you don't, I will report it as stolen, and she actually ended up losing her job because her car was taken from her—or it wasn't taken but the tow truck driver showed up at her place of business and it was a real problem and she is still having to deal with that.

So we have all these problems in the sales of cars that are shrinking our market. You know, it used to be the first purchase people made was a new car. You know, back in Henry Ford's day, cars didn't last as long so people would buy a new car and over time they would go from the Chevy up to the Cadillac, and instead

what is happening now is, most people, their first purchase, especially if they are a young person starting out, is a used car. And if that transaction goes well, all kinds of opportunities open up for them. They get good credit, they have access to better education, better jobs, and if that transaction goes poorly, they may never recover from it. Their credit is hurt. It affects their life for a long time, and we are hoping that that is something that Congress will work with us on resolving.

And we also have a new problem that is emerging, and that is so many dealers going out of business with collateral damage to their customers where they promise to pay off the lien on the cars that are trade in and they don't, and you have been hearing about zombie banks. These are like zombie dealers. You don't know from one day to the next whether the dealer you go to is solvent or not, and consumers are buying cars where the liens have not been paid off end up, you know, in a world of hurt when the lien holder repossesses the car from them even when they make every payment in full and on time. And as Mr. Radanovich knows, this is a real problem in California that we need help with as well.

[The prepared statement of Ms. Shahan follows:]

**House Energy and Commerce Subcommittee on
Commerce, Trade and Consumer Protection
"Consumer Protection in the Used and Subprime Car Market"**

**Testimony of Rosemary Shahan
President, Consumers for Auto Reliability and Safety
March 5, 2009**

Chairman Rush, Ranking Member Radanovich, and Distinguished Members, thank you for the opportunity to testify today regarding "Consumer Protection in the Used and Subprime Car Market."

This hearing is indeed timely, given the current meltdown in the automotive marketplace, which has created a devastating ripple effect impacting not only individual car buyers and their families, but also auto manufacturers and dealers, suppliers, auto workers, auto lenders, and our economy as a whole, as well as our ability to address climate change by accelerating purchases of newer, safer, more fuel efficient vehicles.

In fact, the stakes for consumers and for our nation and the environment have never been higher.

Introduction: Consumers for Auto Reliability and Safety

Consumers for Auto Reliability and Safety (CARS) is a national, non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries and economic losses. Since 1979, I have advocated on behalf of consumers, and am perhaps best known for initiating and working to gain passage of California's landmark auto "lemon law," which became the model for similar laws enacted in all 50 states.

CARS has spearheaded enactment of numerous first-in-the-nation laws to improve protections for new and used car buyers, signed into law by Governors from both major parties. We have also been on the forefront in the promulgation of federal regulations and Federal Motor Vehicle Safety Standards, including rules to require the installation of air bags, modify the design of seat belts to better fit passengers who are small or large in stature, improve the reporting of auto safety defects and safety recall rates, and other major auto safety improvements.

CARS has long supported successful efforts to reduce risky driving behavior, including graduated licensing for teenagers, prohibiting hand-held cell phone use or texting while driving, maintaining reasonable hours of service for truck drivers, and programs to educate caregivers about proper use of child safety seats and booster seats, as well as laws against leaving children unattended in vehicles.

We also work to educate the public about how to avoid common car buying pitfalls and scams, through our website, the public release of reports, a video with tips for car buyers that is posted on

YouTube, and via active outreach in the mainstream media, whenever possible, although auto dealers and manufacturers sometimes pull ads and otherwise attempt to censor the news.

In 1996, CARS spearheaded the consumer groups' petition to the Federal Trade Commission (FTC) seeking action to curb auto "lemon laundering" of seriously defective repurchased lemon vehicles to unsuspecting used car buyers, across state lines.

Last year, CARS and other consumer groups filed comments with FTC regarding the Used Car Rule, seeking reforms including posting information from the National Motor Vehicle Title Information System (NMVTIS) on the Used Car Buyers Guide and providing a special, prominent warning on total loss salvage vehicles.¹

Last year, CARS joined with Public Citizen and Consumer Action to bring a lawsuit against the United States Department of Justice to compel the DOJ to finally issue long-overdue new rules to require insurers, salvage pools and junkyards to submit vitally important data regarding total loss vehicles to the National Motor Vehicle Title Information System, or NMVTIS. In a huge victory for car buyers last fall, a federal district court ordered the DOJ to make the system available to the public and issue the final rules by January 31 of this year, and the DOJ has complied. The judge's order and the new rules also require insurers and junkyards to provide data on totaled vehicles to NMVTIS by March 31, 2009. *See Public Citizen v. Mukasey*, 2008 WL 4532540 (N.D. Cal. 2008); 74 Fed. Reg. 5740.

Problems faced by America's used car buyers

Car buying problems rank #1 among top consumer complaints

According to the most recent survey of consumer complaints compiled by the Consumer Federation of America, National Association of Consumer Agency Administrators, and North American Consumer Protection Investigators, new and used car sales, repairs, and service problems once again top the chart of consumer complaints filed with consumer protection agencies.²

Motor vehicles have a unique place in American life. For most car buyers, in nearly all parts of the country, a safe, reliable motor vehicle is a necessity of life. A motor vehicle is the second-largest purchase most people make, second only to a home. People depend on their vehicles to transport them and their families to work, schools, day care, sports activities, and medical appointments. Many millions of self-employed people, such as landscapers and real estate agents, and small business owners, such as florist shops and carpet cleaners, depend on them to conduct business.

In today's economy, while new car sales have plummeted, car buyers have shifted toward

1 See consumer group comments filed with FTC regarding Used Car Rule Regulatory Review, Matter No. P087604, November 18, 2008. Posted at: http://www.carconsumers.com/FTC_USED_CAR%20RULE.pdf

2 Survey conducted by the Consumer Federation of America, National Association of Consumer Agency Administrators, and North American Consumer Protection Investigators. Among the 39 agencies that responded to the annual survey, there was clear consensus on the following: "The biggest challenges to agencies by far is budget cuts and inadequate staffing. Consumer Agencies say that new laws are needed in car sales...Consumer agencies also cited the need for greater enforcement powers at the state and local level and beefed-up consumer agencies at the federal level. Top Consumer Complaints for 2007: 1. Auto: Misrepresentations in advertising or sales of new and used cars, lemons, faulty repairs, leasing and towing disputes." Released July 10, 2008.

purchasing used autos, which are usually more affordable, but pose greater risks. While there is some overlap between new and used auto sales and lending practices, since the focus in this hearing is on used cars, the bulk of my testimony will also focus on used car problems and solutions.

Shady auto sales and lending practices are a multi-billion dollar drain on consumers' pocketbooks. They also lead to entirely preventable deaths and injuries, causing incalculable suffering, costing businesses and our economy skilled workers and lost productivity, increasing health care costs and burdening our health care system. When the practices afflict members of our Armed Services and their families, they also pose a threat to our national security and interfere with troops' combat readiness, morale, and ability to accomplish their mission.

Illicit auto sales practices are keeping vast numbers of car buyers from being able to save enough to purchase another vehicle, without falling even deeper into debt. Thus, they are shrinking the car market and harming honest businesses as well as the economy as a whole. In addition, the practices shake consumer confidence and impede sales of newer, safer, more fuel-efficient vehicles. Thus, they are totally at odds with the steps Congress has been taking to shore up the auto industry.

Parallels with Home Mortgage Crisis

Auto sales and financing practices closely parallel the predatory and reckless lending practices that have become all too prevalent in home mortgage lending. The similarities are striking. According to some experts, the shady practices that plague home mortgage lending actually originated with auto lending, including:

- Undisclosed conflicts of interest in arranging financing (yield spread premiums / hidden kickbacks)
- Excessive negative equity / little correlation between collateral for the loan and amount of the loan
- No "skin in the game" for loan brokers / finance managers if borrowers default
- Securitization of loans³
- Speculation in securitized loans
- Shift in risk from reckless lenders to borrowers,⁴ under the Bankruptcy Act (S. 256) signed by President Bush in 2005, altering the terms of loans so that borrowers forced into bankruptcy are often liable for the entire amount of the loan, even when the loan is disproportionate to the value of the product / property (eliminating the ability of bankruptcy judges to adjust the amount owed, also known as "cramdown")

³ "New Cars that are fully loaded – with debt," Ken Bensinger, *Los Angeles Times*, December 30, 2007. Posted at: <http://articles.latimes.com/2007/dec/30/business/fi-autoloans30> "About 30% of the loans that are originated by banks, and 100% of those issued by automaker financers, are, like mortgages, repackaged and sold as securities, according to the Consumer Bankers Assn."

⁴ Under the Bankruptcy Act (S. 256) signed by President Bush in 2005, altering the terms of loans so that borrowers forced into bankruptcy are generally liable for the entire amount of the loan, even when the loan is disproportionate to the value of the product / property (eliminating the ability of bankruptcy judges to adjust the amount owed, also known as "cramdown")

Burgeoning negative equity: a "house of cards"

The skyrocketing negative equity in auto loans has been a ticking timebomb that is going off at the worst possible time for our economy. For years, numerous articles in the automotive trade press and in mainstream media warned about the hazards of burdening car buyers with outsized auto loans, often the result of fraudulent activity.

For example, in 2007 the *Los Angeles Times* cautioned that "Americans haven't just been taking out risky mortgages for homes in the last few years; they've also been signing larger automobile loans for significantly longer terms than they used to. As a result, people are slipping into a perpetual cycle of automobile debt that experts think could lead to a new credit crunch extending from dealerships to driveways and all the way to Wall Street."⁵

In fact, that credit crunch, which was entirely foreseeable, is exactly what is happening, with disastrous results for consumers, the auto industry, auto workers and suppliers, auto lenders, our economy and the environment.

Approximately 25 -30% of American car buyers owe more than they receive for their vehicles when they trade them in and purchase their next cars. It's called being "upside down," "under water," or "buried" in their car loans. The amount they still owe, in the form of "negative equity," is typically rolled into the loan for their next vehicle purchase. Essentially, they are paying for two or more vehicles with one over-inflated loan.

The amount of negative equity, on average, has risen to over \$4,000 per vehicle. Millions of car buyers are even further upside down, owing \$10,000 or more than their vehicle is worth. The only way to make their monthly payments affordable is to extend the length of the auto loans. The average length of an auto loan has soared "from 57 months in January 2002 to 64 months in March, [2008], according to Edmunds.com data. But some banks, credit unions and captives such as Toyota Motor Credit Corp. and GMAC Financial Services offer loan terms of as long as 84 months or more."⁶

As a result, the vehicles often die or need an expensive repair the owner cannot afford -- frequently despite paying thousands to purchase a service contract -- long before the loan is paid off. In order to get a functioning vehicle, they trade in the mechanically defective vehicle, and the cycle of debt continues to spiral, sinking them deeper into debt for a product that depreciates from the moment they drive it off the lot.

Despite repeated warnings from bankers, credit rating agencies, and others in a position to assess the increasing risks, auto dealers, manufacturers and lenders ignored the warnings and continued to approve loans, sometimes up to double the price of the vehicle.⁷

Millions of Americans who would otherwise qualify to purchase a home, are unable to qualify due to excessive auto debt which claims a disproportionate share of their monthly income. In other words, auto lending abuses have shrunken the market for buying homes. On the positive side, addressing auto lending abuses will accelerate expansion of the housing market and speed up our recovery from the current recession.

⁵ "New Cars that are fully loaded -- with debt," Ken Bensinger, *Los Angeles Times*, December 30, 2007.

⁶ "Dealers hunt upside-down buyers with leases, incentives and long-term loans," *Automotive News*, May 5, 2008.

⁷ "Mark Pregmon, executive vice president for consumer lending at SunTrust Bank, is among the concerned. "Any time you extend the maturity of the loan, you take on more risk. The question is whether there's enough assessment of that extra risk," he said. "Obviously, it's a problem. It's a house of cards." [emphasis added] -- from "New Cars that are fully loaded -- with debt," Ken Bensinger, *Los Angeles Times*, December 30, 2007.

Auto sales and financing scams harm used car buyers

Each year, millions of American used car buyers fall prey to deceptive practices and illicit activity that can be addressed by stepped-up enforcement of existing laws, completion of the National Motor Vehicle Title Information System, prohibiting the imposition of mandatory pre-dispute arbitration in auto sales, and other governmental actions. The most damaging and pervasive practices are described below.

Salvage fraud

According to the National Association of Attorneys General (NAAG), "auto salvage fraud [is] the greatest consumer problem facing American used car buyers."⁸ NAAG also adopted a resolution calling for improved protections for consumers, noting that "it is estimated that the sale of rebuilt or salvaged motor vehicles costs the motor vehicle industry and consumers up to \$4 billion annually."⁹

In the aftermath of Hurricanes Katrina, Rita and Wilma, when insurers and self-insured entities had dumped the lion's share of an estimated more than 500,000 total loss saltwater flood cars into the American used car market, the United States Senate Commerce Committee held a hearing to hear testimony regarding flood and salvage vehicles. I was invited to testify at that hearing. Rather than repeating my testimony here, please consider it incorporated with this testimony.¹⁰

As noted in my earlier testimony, auto salvage fraud is a threat to the health and safety of many millions of individuals and families who purchase the vehicles, ride in them as passengers, or share the roads with them. Members of CARS, Robert and Mary Ellsworth, tragically lost their son 18-year-old son Bobby, who was killed while riding as a front seat passenger in a salvage pickup truck driven by one of Bobby's friends. The air bags had deployed in a previous crash. State Farm totaled the vehicle and it was subsequently sold at an auction. A rebuilder purchased the salvage vehicle from the auction. But instead of replacing the air bags, the rebuilder stuffed the empty air bag compartments with paper. According to an expert, if the air bags had not been missing, Bobby would have survived.¹¹

Odometer Fraud

While auto manufacturers and dealers claimed that digital odometers would make odometer fraud a thing of the past, the exact opposite has happened. Now, instead of "clocking" old-fashioned analog odometers, often leaving telltale traces such as digits that are out of line, unscrupulous dealers simply purchase new odometers online and plunk them into vehicle consoles. "In fact, digital odometers can be easier to manipulate than their analog counterparts and evidence of tampering is harder to detect."¹²

8 National Association of Attorneys General Memorandum to United States Senators, March 25, 1998, opposing S. 852, which had been approved by Senate Commerce Committee in 1997.

9 National Association of Attorneys General Resolution re: Mandatory Disclosure of Salvage History and Major Damage to Motor Vehicles, adopted March 2-22, 1994.

10 U.S. Senate Commerce Subcommittee on Consumer Affairs, Product Safety and Insurance, Nov. 16, 2005 Hearing "Protecting the Consumer from Flooded and Salvage Vehicle Fraud," Testimony of Rosemary Shahan, President, Consumers for Auto Reliability and Safety. Posted at: <http://commerce.senate.gov/pdf/shahan111605.pdf>.

11 See also "Air bag scams: dashboard danger," Reader's Digest, February, 2008. Posted at: <http://www.rd.com/advice-and-know-how/airbag-scams-dashboard-danger/article51930.html> The Ellsworths have also filed a declaration in the case brought by Public Citizen, CARS and Consumer Action versus the U.S. Department of Justice, posted at: <http://www.citizen.org/documents/EllsworthDeclaration.pdf>.

12 AutoMedia.com. Published November 30, 2008.

According to a study mandated by Congress and conducted by the National Highway Traffic Safety Administration, "The increased cost consumers pay to purchase passenger vehicles with odometer rollbacks of \$1,056,000,000 per year makes odometer fraud one of the top crimes against property in the United States."¹³

A more recent report declares that "Digital odometer fraud is growing at an alarming rate, according to Carfax. The research data reveals the number of vehicles with rolled-back odometers has increased 57 percent nationwide over the past four years." According to Jack Gillis, author of The Car Book, "We estimate one in 10 cars have their odometers rolled back."¹⁴

Not only does odometer fraud mean car buyers are paying more than vehicles are worth, but they also face a double whammy because the warranty on a vehicle with a rolled-back odometer is generally void. Warrantors, unable to determine the number of miles on a vehicle, refuse to honor the warranty. So even if a consumer purchases a late model used vehicle believing they are protected by the remaining years of a factory warranty, they get a rude awakening when they attempt to get the vehicle repaired under the warranty. Manufacturers have access to prior service records and deny warranty claims based on falsified mileage. Corporations that sell extended service contracts typically have the same policies and deny claims on vehicles with altered odometers.

Lemon laundering

All 50 states have enacted state lemon laws that require manufacturers to repurchase lemon vehicles that fail to comply with their warranties. Typically, the laws are triggered when a vehicle has a 'defect ("nonconformity") that "substantially impairs the use, value or safety to the buyer." Each year, auto manufacturers repurchase tens of thousands of "lemon" vehicles that had serious defects they failed to cure under the original factory warranty, in compliance with those laws and the federal Magnuson Moss Act.

When auto manufacturers repurchase lemons, they seldom destroy them, regardless how defective they are. Instead, they have been repeatedly caught by states and individual car buyers dumping them back into the automotive marketplace, defects and all -- a practice known as "lemon laundering." Often the vehicles have a history of serious life-threatening safety defects, such as brake failures, steering that locks up during operation of the vehicle, transmissions that suddenly fail to shift out of first or second gear, or electronic/ computer malfunctions that make the vehicle stall in traffic.

States have attempted to curb lemon laundering. About a dozen states require manufacturers to submit the titles to be "branded" as a "manufacturer repurchase" or -- in California -- "lemon law buyback." Most notably, California sought to revoke the licenses of General Motors and Chrysler after the state obtained internal documents and discovered massive fraud in the resales of lemon vehicles. The manufacturers claimed the vehicles in question were not lemons, but instead were "goodwill"

13 National Highway Traffic Safety Administration, Preliminary Report: The Incidence Rate of Odometer Fraud, NHTSA Report Number DOT HS 809 441, April, 2002. Note that NHTSA found that "An odometer may be rolled back and not identified as such in Carfax as long as the subsequent mileage is not lower than the previous mileage." Since the report relied heavily upon Carfax, it is very likely an overly optimistic assessment of incidence of odometer fraud. The report also did not take into account costs to consumers such as increased repair costs, loss of value upon trading in the vehicle, loss of warranty or service contract coverage due to odometer rollback, towing, loss of use due to breakdowns, loss of jobs, ruined credit, or other related costs.

14 "Odometer rollbacks increase 57% from 2004 - 2008. Business Fleet Magazine online. January 26, 2009.

repurchases. However, they obtained tax refunds that are allowable only when vehicles are repurchased under the lemon law.

General Motors' own internal documents reflected the fact that the vehicles were lemons. For example, GM officials had noted on the "wash out" reports that vehicles had been subjected to repeated repair attempts for substantial problems under warranty, noting that the cars "qualify as a lemon."

More than 80% of the Chrysler vehicles were repurchased after consumers won decisions in arbitration sponsored by Chrysler itself or after consumers had initiated lawsuits. They had undergone up to \$14,000 worth of warranty repairs prior to repurchase.

In 1996, CARS spearheaded a petition to the Federal Trade Commission seeking effective action by the agency to curb auto lemon laundering across state lines. CARS provided voluminous documentation showing that lemons repurchased under state arbitration programs were shipped across state lines and resold with clean titles, making their "lemon" histories more difficult to trace. Other consumer groups and auto fraud experts also submitted detailed comments confirming the existence of the problem.

In response, the FTC sought public comments and held a Public Forum where auto manufacturers, auto dealers, consumer groups, representatives of state Attorneys General, and others met to discuss lemon laundering on the record. Consumer groups recommended that the FTC take steps to enforce laws prohibiting unfair and deceptive trade practices in the resales of lemon vehicles. However, to date the FTC has failed to act.

Meanwhile, lemon laundering continues to occur. Private litigation has unearthed numerous cases of lemon laundering. Class actions brought in West Virginia, and North Carolina against Chrysler found repeated fraudulent acts. Internal documents obtained from Chrysler, revealing how much the company recoups by reselling lemons, were posted on the Internet.

A case brought in California against Ford Motor Company, Johnson v. Ford, found that Ford was attempting to circumvent California's statute against lemon laundering by offering lemon owners "owner appreciation certificates" toward the purchase of a newer vehicle, and assisting the owners in trading in their lemons at Ford dealerships, instead of repurchasing the vehicles outright.

Ohio has taken the commendable step of prohibiting the resales of lemons repurchased due to safety defects such as brake or steering failures within the state. However, even that has not been sufficient to adequately protect Ohio's used car buyers from being victimized by lemon laundering.

For example, a single mother in Akron, Ohio, purchased a used Chrysler vehicle from a car dealership that concealed the fact it had been repurchased by Chrysler in Michigan due to repeated brake failures. The brakes continued to fail. She became afraid to drive the car. The dealer refused to give her a refund. Finally, she sued, and won a unanimous jury verdict. Among the findings: the vehicle was unsafe to drive. Then Chrysler and the dealership appealed the verdict. Eventually, years after she bought the vehicle, she won again against Chrysler and the dealership, on appeal. Meanwhile, she was unable to drive the car.

Vehicle theft and VIN-switching

Auto theft is one of the most costly, pervasive property crimes in the country. In 2006, the value of stolen motor vehicles was \$7.9 billion.¹⁵ When vehicles are stolen before the loans are paid off, insurers typically pay the owners only the fair market value of the vehicle (or less), leaving them stuck with the unpaid remaining debt. Someone who has a loan that lasts for 6 years, and whose vehicle is stolen after two years, is still stuck having to make four years of car payments. This, combined with GAP insurance scams (see above), sinks car buyers deeply into debt.

Another related problem is VIN-switching or "vehicle identify theft." A Vehicle Identification Number (VIN) is like a vehicle's fingerprint -- a unique identifier that indicates its type and origin. In a common VIN-switching scenario, thieves purchase a salvage or non-repairable vehicle at auction, then steal another vehicle that is the same make and model, and switch the VIN to give the stolen vehicle a legitimate VIN. Then they sell it to an unsuspecting car buyer, who is unaware it was stolen. In some cases, consumers have made payments for years on a car that was stolen, only to have it towed away by police when they busted a vehicle theft ring, leaving the car buyer without a vehicle and without their payments.¹⁶

Misleading Vehicle History Reports

Increasingly, car buyers seek information about vehicles on the Internet and from private database services such as Carfax (owned by Polk) and Autocheck (owned by Experian). However, the information offered by those services is far from complete and often unreliable. Often, pertinent information such as prior damage histories, do not appear in a timely fashion, or at all, so the data can be quite misleading. There are also other gaping holes in the data, most glaringly an absence of timely reporting by insurers and self-insured entities.

In addition, access to the data is generally limited to those who have access to computers and to credit, resulting in a serious digital divide that leaves millions of used car buyers vulnerable, without access to vital information. Simply lacking \$29.99 via a credit card for a vehicle history report can have disastrous results, including economic devastation, debilitating injury, or death.

While some auto dealers check Carfax and Autocheck and provide reports, many do not. Some dealers alter the reports to give potential purchasers a false sense of security about the condition of the vehicles. Some seek out damaged autos with clean "Carfax" reports and traffic in them.

It is extremely common for car buyers to be lulled into a false sense of security by a "clean" Carfax report, only to discover after they purchase a vehicle that it was severely damaged in a collision or flood. In one case in Florida, a consumer purchased a used car after being shown a "clean" Carfax report, then the report was updated with information about a collision that had occurred more than a year before the consumer bought the car.

A class action brought on behalf of consumers who obtained Carfax reports against Carfax, alleging that the service was misleading and deceptive, resulted in a settlement agreement that required Carfax to modify disclosures that the information it provides is not complete. We also note for the record that consumers in Canada have access to far more complete data including insurance claims information.

Failure of insurers and self-insured entities to properly "brand" titles

15 National Insurance Crime Bureau, October, 2008 report, posted at: <http://www.iii.org/media/hottopics/insurance/test4/>

16 "Buyers at risk when criminals clone vehicle ID information," by Diane Lade, Associated Press, December 10, 2007.

Some insurers fail to comply with state laws that require them to have titles of vehicles they total "branded" with the notation they are "salvage," "junk," or a similar designation. In 2005, the nation's largest auto insurer, State Farm, entered into an "Assurance of Voluntary Compliance" with the Attorneys General of 48 states regarding its failure to brand the titles on between 30,000 to 50,000 salvage vehicles.¹⁷ While State Farm did not admit any wrongdoing, it strains credulity to believe it could have made completely innocent mistakes tens of thousands of times.

In some cases, the vehicles were in fact "chop jobs" -- halves of different vehicles welded together -- and grossly unsafe. Consumers who had purchased the State Farm salvage vehicles generally had paid Blue Book for them, only to receive a letter informing them their vehicle was in fact a junker, and worth far less than they had paid. Thus, overnight, the value of their vehicles plummeted and they were plunged deeply upside down in their car loans.

Worthless warranties and extended service contracts

Car buyers who purchase used vehicles with the remainder of the factory warranty in effect are led to expect that they will be protected against major defects for the life of the warranty. They usually pay thousands extra for the added warranty coverage. However, if the vehicle sustained undisclosed prior damage in a crash or flood, or has an altered odometer, the manufacturer will not honor the warranty for the damaged components, or sometimes for the entire vehicle.

Consequently, a common consumer complaint is that a vehicle is advertised as having the remainder of the factory warranty in effect, but when vehicle owners attempt to have repairs performed under the warranty, their coverage is denied.

Car buyers spend increasing amounts to purchase "extended service contracts," which they are led to believe will provide adequate protection against expensive repairs. Sales of service contracts are a high-profit item for many auto dealers, who sometimes tell car buyers (falsely) that they must obtain the service contract in order to qualify for financing.

However, many extended service contracts are riddled with loopholes and exclusions. For example, they generally will not cover pre-existing, undisclosed conditions. Virtually no service contract company will cover prior damage, a common reason a vehicle needs further repair.

Numerous companies that offer extended service contracts have pocketed the money and moved offshore, or gone belly up, leaving consumers without the protection they paid for, and with expensive repairs they cannot afford. This sometimes also harms well-intentioned dealers, who are left to deal with repair expenses incurred by car buyers who relied on them to choose a solid company for the service contract.

Some dealers pocket the service contract payment and do not activate the policy. The consumer may not discover this until months later, when they attempt to obtain a repair under the policy. Some service contract companies secretly offer dealers incentives to deny claims, in the form of payments

17 See Assurance of Voluntary Compliance, posted on website of Iowa Attorney General Tom Miller at: http://www.state.ia.us/government/ag/latest_news/releases/jan_2005/State%20Farm%20AVC%20-%20Final.pdf

based on the amount of the contract that is not used to pay claims.

Undisclosed Kickbacks from Lenders /hidden dealer markups

Last fall, the *Sacramento Bee* published an editorial urging California lawmakers to address the mortgage lending crisis, a major factor in the financial meltdown that has plunged the state's economy into the worst fiscal crisis since the Great Depression. The *Bee* urged the following actions:

- "For all home loans, banning the steering, counseling or directing of consumers to a loan that is more expensive than one for which they would otherwise qualify based on their income and creditworthiness. California already does this for some loans (see AB 489, passed in 2001)."
- Banning broker commissions called "yield spread premiums," fees paid by a lender to a broker for higher-rate loans. As Sheila Bair, chairwoman of the Federal Deposit Insurance Corp., has said, these fees create a financial incentive for brokers to steer borrowers to higher-cost loans.
- A study by the Federal Reserve showed clearly that simple disclosure does not solve the problem. As the Fed said, disclosures end up confusing consumers, who believe, falsely, that mortgage brokers have a duty to find them the lowest interest rate and best terms available."¹⁸

Virtually the same practices persist in auto lending, only with even less oversight and regulation. Instead of being called "yield spread premiums," the kickbacks dealers receive from lenders in exchange for increasing the interest rate on auto loans are called "dealer markups," "dealer reserve" or "dealer participation." They have become a major profit center for auto dealers at the expense of consumers.

Instead of receiving loans based on their creditworthiness, car buyers receive loans based on how much the dealer and lender think they can get away with. The "buy rate" car buyers qualify for is not disclosed to them. Often, they are told that the increased interest rate, which includes the dealer markup, is "the best we can do for you" or that "we shopped you around and this is the best you can do." Even those with good credit are misled into thinking their credit is blemished.

As class action litigation brought by the National Consumer Law Center and others on behalf of African American and Latino car buyers under the Equal Credit Opportunity Act showed, auto dealer markups tend to be higher for minority borrowers, even when they have the same credit as their Caucasian counterparts.¹⁹ However, no car buyers who depend on auto dealers to find them a loan are immune from falling prey to excessive interest charges.

While the settlement agreements in the discriminatory lending class action cases reduced the allowable markups among many major lenders, the caps on the markups still allow dealers to receive thousands of dollars for arranging a bad loan, when the consumer could get a better loan on their own for free. This turns the profit incentive on its head and means the worse a job the dealer does in arranging financing, from the consumer's perspective, the more money the dealer makes.

18 "State Can't Delay Mortgage action," Sacramento Bee Editorial, August 18, 2008. Posted at:
<http://www.sacbee.com/110/story/1164578.html>

19 See, for example, *Borlay v. Primus Automotive Financial Services, Inc. and Ford Motor Credit Company*, United States District Court for the Middle District of Tennessee, at Nashville (Civil Action No. CV-3-02-0382). This was widely regarded as the test case regarding discriminatory auto lending, and the judge ruled that the plaintiffs had proven their case.

In an attempt to rein in the worst dealer markup abuses, California passed two landmark laws. The first (spearheaded by CARS) requires dealers to maintain relevant records for up to 7 years, or the length of the loan, whichever is longer. This provides a tool for law enforcement agencies to monitor markups, but it appears that so far no agency has even requested the data. The second law, California's Car Buyers Bill of Rights (based on an initiative drafted by CARS) caps dealer markups at 2.5% for loans up to 60 months and at 2% for longer loans. However, that still allows thousands of dollars in undisclosed markups.

Only one other state -- Louisiana -- caps dealer markups, at 3%. Other states have loosened protections, with predictable results. For example, when Ohio repealed its law that had effectively reined in dealer markups for decades, the costs to Ohio car buyers soared.

In 1999, Texas enacted legislation, signed by then-Governor Bush, that was amended in the waning minutes of the legislative session, with no discussion or debate, to retroactively legalize non-disclosure of dealer markups. The new Texas law passed as an emergency measure that took effect immediately upon signing and applied retroactively to then-pending litigation brought on behalf of thousands Texas car buyers.²⁰ Subsequent class action litigation against General Motors' "captive" finance arm, GMAC, found that Texas car buyers were being charged up to approximately \$15,000 in undisclosed dealer markups.

Often, consumers are subjected to "bait and switch" financing, enticed into going to a dealership that advertises in huge lettering "0% financing." Then, under an asterisk, in tiny print, is written: "Upon credit approval, for qualified buyers." Some ads state the FICO or other credit score needed to qualify for the special rate in the ad, but when car buyers who have scores at least as good as those attempt to get a loan at the advertised rate, they are told (falsely) that their credit does not qualify them for the loan at that rate. Since most consumers do not have ready access to their credit scores, they are prone to being deceived. Auto industry analysts have noted for years that most consumers do not obtain the "0% financing" that is so prominently advertised.

Dealer falsification of credit applications

Another common practice that plagues used car buyers: auto dealer finance managers who falsify credit applications. This happens several different ways. Often, consumers fill out a credit application truthfully, only to have it altered without their knowledge after they have signed it.

For example, the consumer fills out a credit application, stating that their income is \$1100 per month. They sign the application. Then the finance manager alters it to indicate that their income is \$4100 per month, and submits the false information to prospective lenders. Typically, consumers are not given a copy of the credit application that has been submitted to the lenders, so they may never realize it was altered after they signed it.

While lenders are required by federal law to report such acts to authorities, when they become aware the applications were false, they may be reluctant to comply. Lenders who blow the whistle risk

²⁰ H.B. 2180, enacted in 1999. See also "Suits are threatened by new law," by Mary Flood, *Wall Street Journal*, June 30, 1999. "Thanks to some little-noticed legislative tweaking, a banker-backed measure approved by the Texas legislature last month could lead to the dismissal of a pair of East Texas consumer lawsuits...the suits...accuse area auto dealerships and some large national banks of defrauding consumers who financed their car purchases through the dealerships at higher rates than the dealers were getting from the banks...attorneys for defendants in the earlier case -- Peltier Enterprises Inc...and Bank of America Corp. ...filed a motion to dismiss the case the Monday after Gov. George W. Bush signed the measure into law [on a Saturday]."

losing business directed to them by auto dealers.

However, recently, federal authorities have received reports from lenders alleging that loan applications were falsified, and have brought actions to curb such activity. For example,

"A combined force of nearly a dozen FBI and Immigration and Customs Enforcement agents raided [a dealership in Madera, California.] According to the indictment, the suspects operated a scheme to enable customers to obtain financing, even if they didn't qualify, by preparing false financial documents and forwarding them to Valley First Credit Union.

Federal investigators believe the suspects entered fictitious information on loan applications, including the names of employers for whom the customers didn't work. The men also inflated the earning amounts of customers, in addition to creating fictitious earnings statements to reflect payments of wages by businesses that never employed the customers, according to the federal indictment....Investigators believe VFCU sustained a loss of about \$540,000, because many customers didn't have the ability to meet the terms of the loans."²¹

In North Carolina, the owner of six auto dealerships plead guilty to aiding in the filing of falsified loan applications. Law enforcement officials told reporters that some loan applications included household appliances listed as traded-in vehicles. Employment records were also faked.²²

Yo-yo financing

Even sophisticated car buyers who succeed in negotiating good terms on an auto loan are often matched for a prevalent high-pressure auto sales tactic known as "yo-yo" financing. Auto dealers usually call it "spot delivery." It is basically a form of financial "bait and switch."²³

In a typical yo-yo transaction, a car buyer and dealer agree on the terms of a loan, at a reasonable interest rate. The car buyer signs a retail installment contract spelling out the terms, and the dealer congratulates them on their purchase. The car buyer then drives off in their newly purchased vehicle, and shows it to their family, friends, and co-workers. Then a week or two later, he or she receives a call from the dealership telling them that the financing was not approved and they need to return to the dealership with the car. When they do, they are pressured into signing a different agreement with worse terms -- a larger downpayment and / or a higher interest rate.

The reality is that with rare exceptions any finance manager with basic knowledge of his business knows almost immediately whether a car buyer will qualify for a purchase. Virtually all major auto lenders either approve or reject loans within a matter of seconds, electronically, 24/7. Some dealers do not even attempt to find financing for the car buyer at the lower rate, so the claim that they were rejected is false. Other dealers shop the loans around in an attempt to find a higher kickback from

21 "Feds raid Merced auto dealership, arrest four men in bank fraud investigation," *Madera Sun-Star / Modesto Bee*, December 4, 2008. Posted at: <http://www.modbee.com/1623/story/521620.html>

22 "Charlotte car dealer to plead guilty to false loan papers," the Associated Press. Winston-Salem Journal, January 6, 2009. The indictment said some Harrelson employees lied about the ability of customers to pay for vehicles by falsifying incomes, down payments and employment history on loan applications...Prosecutors said the loans cost financial institutions more than \$1.2 million and that the conduct was "open and notorious." Posted at: <http://www2.journalnow.com/content/2009/jan/06/charlotte-car-dealer-plead-guilty-false-loan-paper/>

23 "Yo-yo deals: Stringing car buyers along," by Don Oldenburg, Washington Post, October 19, 2004. Posted at: <http://www.washingtonpost.com/wp-dyn/articles/A43629-2004Oct18.html>

another lender, then engage in yo-yo tactics to increase their own profit on the sale.

If the car buyer has traded in another vehicle, they are told that they cannot have it back -- even if the traded-in vehicle is still sitting on a back lot. This is known as "de-horsing" the buyer -- getting them out of the vehicle they own, so they need another vehicle in order to have transportation.

Car buyers who balk at being yo-yo'ed are sometimes threatened with destruction of their credit and / or arrest for auto theft. The pretext is that the contract is void since the financing was not approved. Some have actually had their vehicles towed by tow truck drivers who told their employers and co-workers they stole the vehicle. If they abandon the vehicle at the dealership, they risk having it treated as a voluntary repossession, ruining their credit.

Members of the Armed Forces are particularly vulnerable to yo-yo financing. Dealers threaten to report troops to their command, and / or to police, telling them they will lose their security clearances unless they sign the new contract. According to testimony by military personnel in California, based on an informal survey of military Judge Advocates General, "yo-yo" financing was a major factor in making auto purchasing the single worst financial readiness problem facing troops stationed in the state.²⁴ In Arizona, a military base resorted to declaring some dealerships off-limits due to practices including yo-yo financing.²⁵

Loan packing

"Loan packing" is a very common, highly sophisticated scam that has become a major source of profits for many unscrupulous auto dealers. Loan packing involves deceiving car buyers about the amount they are being charged for add-on items. If the buyers resist, finance managers may pressure them by telling them (falsely) the items must be part of the deal in order to get a lower interest rate or to be approved for financing.

Items commonly "packed" into loans are usually high-profit items that are added on and have little or no inherent value. Common examples: theft etching, paint sealant, rust proofing, GAP insurance, extended service contracts, and special sound systems. In some cases, car buyers have been misled into paying thousands, over the life of their loan, for items that cost the dealer less than \$40.

Not only is loan packing a waste of consumers' hard-earned cash, it also keeps them from being able to afford other items they could have purchased for less, such as electronic stability control systems, which are proven greatly reduce the risk of rollover deaths and injuries.

GAP insurance scams

In an attempt to ensure protection from being saddled with negative equity, more consumers are purchasing "Guaranteed Asset Protection" policies to cover the full amount of the loan, in the event their vehicle is damaged or stolen. However, the policies are riddled with loopholes and exclusions, and companies that offer "GAP" policies often shortchange consumers and delay making payments for many months. Meanwhile, consumers are left to fend for themselves to obtain transportation.

24 Testimony presented before California Assembly Banking and Finance Committee, Pico Rivera, CA, March 11, 2005.

25 "Military base declares dealerships off-limits," Arizona Daily Star, July 13, 2008.

Some dealers pocket the GAP payment, then fail to activate the policies. Particularly if the dealership goes out of business without activating the GAP policy, car buyers have little or no recourse.

Car Title Loans

In some states, it is still legal for consumers to surrender the title to their vehicle as collateral for a loan, a practice sometimes also known as "car title pawning." Many experts consider this to be tantamount to legalized car theft. Typically, the loans are far less than the value of the vehicle and the terms are nearly impossible for the car owner to meet. For example, the loan must be repaid in person at an exorbitant interest rate on a weekday at a time when the shop is closed. The end result: desperate consumers who need a short-term loan for a medical procedure or other emergency too often end up losing their only means of transportation. Enactment of interest rate caps at 36% have proven effective in curbing car title loans.

Failure to Report Good Credit Activity to Credit Bureaus

Many "Buy Here / Pay Here" used car lots lure car buyers to shop there by advertising that they will help them build up their credit. They target car buyers who either lack a credit history because they have not used credit in the past, or who have subprime credit. However, the dealerships generally fail to report credit activity to any of the major credit reporting agencies.

Consequently, even when the car buyers make every payment in full and on time, they generally fail to benefit in terms of achieving a good credit rating. In addition, the practices at "Buy Here / Pay Here" lots often involve various frauds that end up hampering the car buyers' ability to get better terms at other dealerships in the future.

Dealers going out of business and leaving customers in the lurch

When car dealers go out of business, they sometimes leave their customers holding the bag for unpaid liens. Subsequent purchasers also suffer, through no fault of their own. This is a serious and growing problem nationwide.

Car buyers who had credit good enough to qualify for loans even in the current climate, where credit is very tight, are having their good credit trashed by dealers who promise to pay off the negative equity on their auto loans. The negative equity is rolled into the next transaction. Then the dealer fails to pay, leaving the hapless car buyer saddled with two car payments but only one car.

Usually the car buyer is unaware the loan has not been paid until months after their new purchase, when their lender contacts them to demand payment and informs them they are behind on their payments. Although the car was traded in, the car buyer is still on the hook to pay the loan. Unable to pay for the loan on the car they traded in, in addition to their new purchase, they fall behind on their payments. Sometimes one or both vehicles are repossessed, a very negative report which may remain on their credit history for the next 7 years. A bad credit report can keep the consumer from getting employment, or housing.

Car buyers who purchase used vehicles with unpaid liens are also being victimized by dealers who sold them vehicles without disclosing that the loans had not been paid. They may make every

payment in full and on time, only to have their vehicle repossessed by the former owner's lienholder. Suddenly, without any warning, they are without their down payment and /or traded-in vehicle, any repairs they have made, and their car. In some cases, the sudden lack of transportation has cost them their good credit and / or their job.²⁶

As the auto market shrinks, dealers are closing their doors in record numbers. Nearly every manufacturer is consolidating its dealership network. General Motors alone has announced plans to eliminate several hundred dealerships this year. However, they have not made public which dealers are going to be bought out.

California has been harder hit than any other state, with 137 new car dealers closing in 2008 and another 131 stating in a survey that they will be forced to close within the next 6 months unless they get assistance from the federal government.²⁷ In addition, at least 416 used car dealerships closed in 2008. Hundreds more are expected to close this year. In response, California State Senator Ellen Corbett has introduced the Car Buyers Consumer Protection Act, SB 95, to help improve protections for car buyers. (SB 95 is "sponsored" by CARS.)

While several states have established restitution funds to help compensate victims, the amounts in the funds are not always sufficient to cover all the claimants. California's restitution fund is capped at a maximum of \$5 million per year. According to DMV officials, that will not be sufficient to cover all the losses California car buyers are suffering. Some large dealerships have left hundreds of car buyers holding the bag, costing them a total of \$500,000 or \$1 million in losses, per dealership.

Also, the restitution funds do nothing to restore consumers' good credit or get them back jobs they have lost. For many car buyers, the harm to their good credit, and the negative ramifications for them, are far worse than the monetary loss.

Most states require only a minimal surety bond of \$5,000 or \$10,000 for dealers to obtain a license. When they go out of business, there is usually little recourse for car buyers who are harmed. The bond is not enough to cover a single average-priced used car.

National Motor Vehicle Title Information System (NMVTIS) not yet complete

NMVTIS is a national vehicle database system mandated by the Anti-Car Theft Act of 1992,²⁸ which required the U.S. Department of Transportation to create NMVTIS, and the Anti-Car Theft Improvements Act of 1996,²⁹ which shifted authority over NMVTIS to the U.S. Department of Justice after DOT failed to act.

According to a cost-benefit analysis commissioned by the U.S. Department of Justice, completion of NMVTIS will save the American public between \$4 billion and \$11.3 billion annually, by curbing auto theft, salvage fraud, odometer fraud, VIN-switching, and related crimes. It will also enhance homeland security.³⁰

26 For news reports by the Associated Press, New York Times, San Francisco Chronicle, and other news organizations about this growing problem, see links posted at CARS' website, at: http://www.carconsumers.com/Bailout_news.html.

27 "Sacramento car dealers seek federal loan help," *Sacramento Bee*, February 26, 2009.

28 P.L. 102-519 Sections 202-04, 106 Stat. 3390-93.

29 P.L. 104-152 Sections 2-3, 110 Stat. 1384.

30 Logistics Management Institute Report, Cost-Benefit Analysis, submitted to U.S. Department of Justice, 2001. Posted at: http://www.ojp.gov/BJA/pdf/LMI_NMVTIS.pdf

On January 30, 2009, the U.S. DOJ implemented consumer access to the system and issued long-overdue new rules to require insurers and junkyards to provide data on totaled vehicles to NMVTIS, where the data must be updated every 30 days and made available to the public at cost. The U.S. DOJ took this important step in compliance with a court-ordered deadline issued pursuant to litigation filed by Public Citizen, CARS, and Consumer Action.³¹

However, while significant progress is being made toward completing NMVTIS, and it currently includes 73% of the vehicle population, 14 states fail to participate in the system. Others are providing data to the system but not fully participating.³² For details about state compliance,

While California now provides data to NMVTIS, the state has entered into an illegal agreement with the system operator, the American Association of Motor Vehicle Administrators, that bars consumers from accessing California's data directly through NMVTIS. Instead, California car buyers will be more restricted in being able to access the information, under a contract California's DMV has with Polk (Carfax). Currently, CARFAX charges \$29.99 for the history for a single VIN. Consumers in other states will have access to other vendors. One such vendor is offering vehicle histories for \$2.50 for a single VIN. Thus, used car buyers in other states will benefit from a competitive environment, while California's used car buyers will not enjoy the same benefits.

Ironically, California, with the nation's largest auto market, and where auto salvage fraud is rampant, has the most to gain by participating in NMVTIS. According to California's Department of Motor Vehicles, more than \$1,692,000 vehicles registered for used on California roads have titles indicating they were once totaled by an insurer and are considered "salvage."³³ California also has 4 out of the top 5 auto theft "hot spots" in the United States -- Modesto, San Diego/Carlsbad/San Marcos, Stockton, and San Francisco/Oakland/Fremont.³⁴

In order for NMVTIS to fulfill its Congressional mandate, additional funding in the amount of approximately \$40 million is needed so that the DOJ can update NMVTIS and provide necessary assistance to states.

We are pleased to note that the DOJ has proposed working with the FTC regarding posting information about NMVTIS on the Used Car Buyers Guide, a step long recommended by CARS and included in the consumer group comments to the FTC.

**Mandatory pre-dispute arbitration leaves car buyers at the mercy of
unscrupulous dealers and lenders**

One of the leading reasons auto sales and lending practices have sunk so low is that consumers have lost the ability to defend themselves against even the most blatant violations of existing federal and state laws and regulations due to the widespread imposition of binding mandatory pre-dispute

31 *Public Citizen et.al. v. Michael Mukasey*, filed in the U.S. District Court, Northern District of California. This action has since been amended to *Public Citizen v. Eric Holder*.

32 For details about states' compliance, see: <http://nmvtis.gov/>

33 Message from Dennis Clear, Legislative Director, California Department of Motor Vehicles, July 18, 2007: "As of 7/1/07, we have 1,692,535 salvage vehicles on file." This number does not include those vehicles with "washed," altered or counterfeited titles, where the "salvage" brands have been removed. The number is also far lower than before the ruling in *Martinez v. Enterprise*, interpreting California's definition of "salvage" to allow a vehicle to be destroyed up to 100% of its pre-crash value before it must be branded as "salvage."

34 America's car theft hot spots, *Forbes.com*, quoting data from the National Insurance Crime Bureau, July 11, 2008.

arbitration.

Given the sheer volume of auto sales each year, with tens of millions of transactions, state agencies and local consumer protection agencies cannot possibly police all the transactions, or even enough of them to deter illicit behavior. During this era of strapped state and local budgets, when consumer protection agencies have had to lay off staff, enforcement is becoming even weaker.

While auto sales and service complaints perennially top the list of consumer complaints, car buyers who have been subjected to illegal practices are almost always told that it is a civil matter and they are on their own.

In the past, they would have had the ability to invoke longstanding consumer protection laws and regulations in their own defense by bringing civil litigation. However, due to dealers and lenders inserting arbitration clauses in auto contracts -- often on the back, in fine print, in confusing and legalistic terminology -- they have lost the ability to defend themselves.

As Members of Congress argued in favor of granting auto dealers access to courts for resolving disputes with auto manufacturers:

- The contracts are take-it-or-leave it, boiler-plate contracts of adhesion.
There is no real opportunity to negotiate.
- The parties to the contracts are on an unequal footing.
- Arbitrators are inherently biased in favor of repeat customers, who can track their decisions and have the advantage of knowing which arbitrators have ruled in their favor in the past.
- Arbitrators are not required to apply the law or adhere to judicial precedents.
- Even if the arbitrators totally disregard the law, there is little or no review, and rarely any check on their power. There is seldom even any record that would be subject to review.
- Discovery is either non-existent or very limited. Without discovery, consumers are severely disadvantaged. This enables crooked dealers to conceal material facts from their victims and from the arbitrators.
- Arbitrations occur in a vacuum. They almost always operate in secret. If a dealer has engaged in widespread violations of the law, it may never come to the attention of law enforcement agencies or policymakers, who might otherwise act to protect the public.

In some cases, car buyers who were defrauded have been compelled to submit their disputes to arbitration, only to have the dealer delay responding to communications for years, trapping them in "arbitration hell," where years go by without a hearing. One consumer in the San Diego area who was sold a rebuilt wreck has had to continue making payments for more than two years on a vehicle that he cannot drive because it is unsafe, while he has waited simply to get a hearing before an arbitrator in a forum chosen by the dealership that sold him the clunker. If he had been able to litigate, he very likely would have recovered his losses in an out-of-court settlement, within a matter of months.

In some cases, consumers have won cases in arbitration, only to have the dealership refuse to abide by the decision, forcing the consumer to litigate in order to enforce the decision. The absurdity of this situation puts the lie to any claim by auto dealers that arbitration is somehow a better alternative to

litigation, since it is only the prelude.

The same arguments that were made by auto dealers and Congress in favor of preserving the rights of auto dealers apply equally to consumers, if not more.

As Senator Hatch stated when he introduced S. 1140, “The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001,” the new law was needed to protect auto dealers from having mandatory arbitration clauses imposed upon them by auto manufacturers, due to their “unequal bargaining power.”³⁵ As Senator Grassley, speaking in support of S. 1140, stated:

“While arbitration serves an important function as an efficient alternative to court, some trade-offs must be considered by both parties, such as limited judicial review and less formal procedures regarding discovery and rules of evidence. When mandatory binding arbitration is forced upon a party, for example when it is placed in a boiler-plate agreement, it deprives the weaker party the opportunity to elect another forum. As a proponent of arbitration I believe it is critical to ensure that the selection of arbitration is voluntary and fair...Unequal bargaining power exists in contracts between automobile and truck dealers and their manufacturers. The manufacturer drafts the contract and presents it to dealers with no opportunity to negotiate...The purpose of arbitration is to reduce costly, time-consuming litigation, not to force a party to an adhesion contract to waive access to judicial or administrative forums for the pursuit of rights under State law.”³⁶

Senator Grassley also stated that:

“This legislation will go a long way toward ensuring that parties will not be forced into binding arbitration and thereby lose important statutory rights. I am confident that given its many advantages arbitration will often be elected. But it is essential for public policy reasons and basic fairness that both parties to this type of contract have the freedom to make their own decisions based on the circumstances of the case.”³⁷

While S. 1140 did not pass, auto dealers were given an exemption from the Federal Arbitration Act by passage of H.R. 2215 in 2002. That act, now codified at 15 U.S.C. section 1226, prohibits auto manufacturers from including any type of pre-dispute arbitration clause in franchise contracts with auto dealers. Specifically, it provides that arbitration may be used to settle a controversy arising out of a motor vehicle franchise contract only if both parties consent, in writing, and only after the dispute arises. The same rights should be restored to car buyers.

A year ago, I testified in support of passage of legislation sponsored by Representative Linda Sanchez, H.R. 5312, the Automobile Arbitration Fairness Act. That legislation passed in the House Judiciary Subcommittee on Commerce and Administrative Law. It should pass in Congress and be signed by the President. The sooner it passes, the sooner car buyers can begin to feel more confident if they are cheated over their car purchase, they can right the wrong and obtain justice.

It is important to note for the record that the National Automobile Dealers Association wrote to

35 Statements on Introduced Bills and Joint Resolutions, United States Senate, June 29, 2001. Statement by Senator Hatch of Utah.

36 Statements on Introduced Bills and Joint Resolutions, United States Senate, June 29, 2001. Statement by Senator Grassley of Iowa.

37 Statements on Introduced Bills and Joint Resolutions, United States Senate, June 29, 2001. Statement by Senator Grassley of Iowa.

Congress when car dealers sought their exemption from the Federal Arbitration Act and promised not to oppose similar legislation to protect consumers. However, auto dealers have violated the spirit, if not the letter, of that promise, since auto dealers' state trade associations and individual auto dealers have been actively opposing passage of H.R. 5312.

Solutions

In order to restore consumer confidence in the automotive marketplace, save the American public many billions of dollars, save lives, prevent injuries, and accelerate the replacement of the U.S. vehicle fleet with newer, safer, more fuel efficient vehicles, CARS strongly urges that Congress, the Federal Trade Commission, and the U.S. Department of Justice take the following actions:

Congress should:

- Act immediately to provide relief and restitution for car buyers victimized by dealers that go out of business
- Act immediately to establish a federal task force to assist car buyers victimized by dealers that go out of business in restoring their good credit. The task force should be empowered to provide pro-active outreach to victims, identifying them and working with lenders and credit reporting agencies to put victims on a fast track to have their credit restored.
- Provide approximately \$40 million in funding to the US Department of Justice for completion of the National Motor Vehicle Title Information System, or NMVTIS. This includes funds to assist states in fully complying with the law.
- Enact legislation to amend the Anti-Car Theft Improvement Act of 1996 to:
 - Tighten the time period allowed auto insurers and junkyards to submit data to NMVTIS from the existing 30 days to the same day as the vehicle is totaled
 - Require full disclosure regarding vehicles with serious damage below the threshold for being "totaled," so vehicle buyers can weigh whether to purchase those vehicles or not, and are made aware the prior damage will likely reduce their value and /or safety
- Grant the Federal Trade Commission authority to issue new regulations through a more efficient, less burdensome process
- Continue to exercise oversight over the Federal Trade Commission's rulemaking and other activities to curb predatory, unfair, and deceptive practices in the automotive marketplace
- Enact H.R. 5312, The Automotive Arbitration Fairness Act, sponsored by Representative Linda Sanchez
- Enact the "Protecting Consumers from Unreasonable Credit Rates Act of 2009" (S. 500), sponsored by Senator Richard Durbin, to amend the Truth in Lending Act to impose a national cap on consumer credit interest rates

The FTC should:

- Step up enforcement against unfair and deceptive practices in the automotive market
- Modify the Used Car Rule, as described in comments CARS and other consumer groups filed with the FTC, including requiring specific written warnings on total loss vehicles that appear in the NMVTIS database.
- Update the Used Car Rule in order to comply with new legislation enacted by Congress to amend the Anti-Car Theft Improvement Act of 1996 to include full disclosure regarding vehicles with serious damage below the threshold for being "totaled"

The US DOJ should:

- Continue to move forward in completing NMVTIS
- Step up enforcement of existing laws against falsifying credit applications and other forms of fraud
- Participate on behalf of consumers in legal actions to enforce the Equal Credit Opportunity Act and Truth in Lending Act.

CARS also strongly urges the White House and other Executive Branch agencies to work closely with Congress, the DOJ and the FTC to ensure the actions outlined above are taken and car buyers are protected.

Thank you again, Chairman Rush, Ranking Member Radanovich, and Distinguished Members, for the opportunity to testify. I greatly appreciate your work and that of the Committee and Subcommittee staff, and look forward to working with you to improve protections for America's car buyers and their families.

Mr. RUSH. Thank you so very much. We will have ample opportunity during the question-and-answer period.

Our next witness is Mr. Van Alst for 5 minutes. You are recognized.

TESTIMONY OF JOHN W. VAN ALST

Mr. VAN ALST. Chairman Rush and Ranking Member Radanovich and distinguished members of the subcommittee, it is an honor for me to testify before you today on behalf of the low-income consumers and clients of the National Consumer Law Center about consumer protection in the used car market. I thank you and your staff for holding a hearing on these very important issues.

For years I was with Legal Aid in North Carolina and every day I saw working families that lacked a safe, reliable car because of the abuses and problems in the used car sales and finance market. These families lost jobs and they were unable to get their children to school or daycare and to doctors' appointments. Since I have joined the National Consumer Law Center, I have had the privilege to work with hundreds of advocates and attorneys across the Nation trying to address these issues and I have seen just how widespread and common they truly are, and in part that was the basis for the report that we produced on fueling fair practices, which I have submitted to the committee, and Mr. Chairman, with your permission, if we may have that added to the record as well, I would appreciate that.

Mr. RUSH. Hearing no objections, so ordered.

[The information appears following Mr. Van Alst's testimony.]

Mr. VAN ALST. Cars in poor and even dangerous condition are sold to consumers as safe and reliable transportation, and this could be avoided if dealers were required by the FTC to disclose known defects and to post NMVTIS reports on the cars that are offered for sale and if insurance companies were just required to report all claims data in the United States, the same way that those same insurance companies are required to do so in Canada. Consumers are often charged higher interest rates than they qualify for. You see, because the dealers typically arrange the financing, they contact prospective lenders who inform the dealer of the terms on which they would be willing to lend. Often the dealer puts the consumer in a higher interest rate loan and splits the difference with the lender. For example, if the lender is willing to lend to the consumer at 8 percent based upon the consumer's credit history, the dealer will put the consumer in a loan at 16 percent and then the lender and the dealer split that extra money that will be paid by the consumer over the life of the loan.

These markups, as you have pointed out, have a disparate racial impact. Litigation mounted by NCLC and others has demonstrated that minority car buyers pay significantly higher dealer markups than non-minority car buyers with the same credit histories. This practice costs consumers hundreds of millions, if not billions of dollars, and yet it is undetectable by the consumers and most anyone else, for that matter. While the FTC and the DOJ are charged with enforcing the Equal Credit Opportunity Act, which prohibits such disparate treatment, they currently lack the tools to know when it is occurring and to combat it effectively. This and other problems

could be addressed through the creation of a federal data collection system for auto finance similar to the Home Mortgage Disclosure Act.

The buying process itself is intentionally structured to be needlessly complicated and time consuming to wear down and confuse car buyers and enable dealers to slip in overpriced add-ons and other items that are profitable for the dealer and often not very useful for the consumer. Excess dealer profits are hidden in additions such as window etching service contracts, rustproofing and vastly inflated document preparation fees. Dealers also use tactics such as yoyo sales where the consumer drives away in a newly purchased car only to be called back several days or a week later and told sometimes untruthfully that financing could not be arranged at the original terms and the consumer has to enter into a new contract at a higher interest rate or with a higher down payment. Of course, if the consumer rather than the dealer had decided that they didn't want to take the car and tried to get out of it, the dealer would have told them the sale was final. Sometimes the dealer will have already sold the consumer's trade-in or tell the consumer that he or she is responsible for extra charges if the new, less desirable terms are not accepted. The FTC especially if it receives enhanced rulemaking authority should prohibit such tactics as unfair and deceptive.

These abuses and all the other abuses we see in the used car market do not just harm the individual car buyer that gets the bad car or the bad loan. These practices make the entire market less competitive and less transparent. Dealers that would like to deal fairly with the public and compete on price and quality of the car are driven out of business by dealers using these deceptive tactics, and just as we have seen from the problems in the mortgage industry, the inflated cost and discriminatory loans and the outright fraud in these transactions can spill over to the larger economy.

While many of the changes that are necessary to bring transparency, efficiency and competitiveness into the market will have to occur at a State level, there are a number of very important things that the Congress and agencies and the Administration can do to stop these abuses, and these changes are urgently needed. The current system results in unfair transactions and hamstrings working families that have to have a car. We look forward to working with you, and I am happy to answer any questions you might have.

[The prepared statement of Mr. Van Alst follows:]

Consumer Protection in the Used and Subprime Car Market

Written Testimony of
John W. Van Alst

On behalf of the Low Income Clients of the
National Consumer Law Center¹
Before the Subcommittee on Commerce Trade
and Consumer Protection of the
Committee on Energy and Commerce
United States House of Representatives

March 5, 2009

Chairman Rush, Ranking Member Radanovich, and distinguished Members of the Subcommittee, it is an honor for me to testify before you today on behalf of our low income clients about consumer protection in the used car market. I thank you and your staff for holding a hearing on these very important issues.

In much of the United States, working families can not be self-sufficient and productive without a car. Yet abuses in the market for buying and financing a car often unnecessarily increase the costs of a car, or preclude families from buying and keeping a reliable car. This is especially true for low-income families. Households with incomes below \$25,000 are nine times more likely to be without a car than households with incomes above \$25,000.² Families trying to buy and finance a reliable car face many hurdles and stumbling blocks, such as cars in poor or even dangerous condition that dealers present as safe and sound, kick-backs to dealers from financers for putting consumers in a more expensive loan than they qualify for, deceptive sales practices, junk products and fees that add to a car's cost, and outright fraud.

While many of the changes that are necessary to bring transparency, efficiency, and, fairness to the market will have to occur at the state level, there are a number of very important things that can and should be done by federal regulatory agencies, the administration, and Congress to stop these abuses. The Federal Trade Commission should improve its "used car rule" and increase enforcement of existing rules in the car market. The Department of Justice should ensure that the National Motor Vehicle Title Information System contains complete information and is easily available to car buyers. The National Highway Traffic Safety Administration (NHTSA) should amend its exemptions so that cars over ten years old are subject to the disclosure requirements of the Motor Vehicle Information and Cost Savings Act. Legislative changes should be made such as the creation of a data collection system for car loans, a ban on pre-dispute

¹ The National Consumer Law Center is a non-profit organization that seeks marketplace justice on behalf of low-income and vulnerable Americans. NCLC works with, and offers training to, thousands of legal-service, government and private attorneys, as well as community groups and organizations representing low-income families. Our legal manuals and consumer guides are standards of the field.

² U.S. Department of Transportation, Bureau of Transportation Statistics, *NHTS 2001 Highlights Report*, BTS03-05 (Washington, DC: 2003).

binding arbitration clauses in car sales and finance transactions, adjustments of Truth in Lending coverage, and removal of restrictions on modification of car loans in bankruptcy.

Such changes are urgently needed. The current system results in unfair transactions. It hamstrings working families that have to have a car. Ultimately, the fraud and abuse in these individual transactions aggregate into a dysfunctional credit economy.

COMMON ABUSES

Policies currently in place are generally insufficient to protect consumers when buying and financing a used car. Although new and used car dealer complaints are recorded separately by the Better Business Bureau, if the two are combined there are more complaints filed with that organization about car dealers than any other industry.³ AGs are also inundated with complaints about car dealers.⁴ Considering that many car buyers never discover that they have been defrauded, the level of complaints is striking. Abusive practices mean that all too often a used car is a liability rather than an asset for a family, draining essential resources instead of providing a route to success and self-sufficiency. Car buyers fall victim to a number of practices that greatly reduce their ability to obtain a useful car that can meet their needs at a fair sales price with fair financing.

The way in which cars are sold and financed is intentionally structured to be needlessly complicated and time consuming in order to confuse buyers and enable dealers to charge excessive prices and fees for the car and financing. Dealers use psychological tactics to influence consumers. Often dealers force the consumer to stay at the dealership for long periods of time by keeping the potential trade-in, keeping the consumer's driver's license, or other ruses. The consumer is worn down and becomes much more susceptible to the dealer's efforts to extract excess profits from the transaction. Dealers mislead and simply lie to consumers.

Dealers also use tactics such as "yo-yo sales" to reduce any chance the consumer has of getting a fair deal. In a yo-yo sale the dealer sends the customer off the lot driving the newly purchased car only to call the customer back several days later to say (sometimes untruthfully) that financing could not be arranged at the original terms and the consumer must sign new documents at a higher interest rate or other worse terms. Of course, if the consumer, rather than the dealer, had reconsidered the transaction and wished to back out, the dealer would be quick to tell the consumer that the deal is binding and the consumer may not cancel the transaction. Sometimes the dealer will have already sold the consumer's trade-in or tell the consumer that the consumer will be responsible

³ It is important to note that BBB does not include numerous related categories such as auto warranty processing, auto leasing, or auto rust proofing in the dealer category. See http://us.bbb.org/WWWRoot/storage/16/documents/stats%20pdf/US_by_Complaint_2008_inter.pdf

⁴ Top five in Oregon in 2008 see <http://www.doj.state.or.us/releases/2008/re1030508.shtml>; top five in NC 2007 see <http://www.ncdoj.gov/DocumentStreamerClient?directory=CPTipAlert/&file=Top%20Ten%20Complaints%202007%20list.pdf>

for extra charges and costs if the new, less desirable, terms are not accepted. Regardless of whether the dealer is being truthful, often the customer is in no position to refuse the new onerous terms.

Sometimes the dealer is simply bringing the customer back in to get an even higher interest rate or add on more profitable items to the sale. These dealers realize that consumers are more likely to agree to these terms after they already feel so invested in the deal and are reluctant to see it undone. Often the consumer has already paid additional money to third parties for insurance or improvements to the newly purchased car. The consumer often believes there is no choice but to accept the new terms presented by the dealer. Even if the dealer is truthful and was unable to find a willing lender, the consumer is still in the position of walking away from a deal after investing substantial time and money.

Dealers often structure the negotiation for the sale of a car to obscure the costs and to prevent the consumer from understanding whether he or she is getting the car at a fair price. Excess dealer profits will be hidden in additions such as “window etching,” service contracts, rust proofing, and vastly inflated document preparation fees. Consumers may pay thousands of dollars for window etching that costs the dealer fifteen dollars and a guaranty of little or no value. In extreme cases, consumers have paid as much as \$2,000 for a pen and key chain costing the dealership \$15.⁵

If a consumer is able to uncover evidence of wrongdoing on the part of the dealer or finance company, often any meaningful compensation for the consumer or any punitive award to stop such behavior in the future will be unavailable because of language inserted in the contract denying consumers the right to go to court and forcing them to resolve any disputes in arbitration.

Financing markups by dealers create another opportunity for abuse. In most car purchase transactions, the dealer arranges the financing in addition to selling the car. Dealers typically contact prospective lenders and present the consumer's financial information. Lenders then inform the dealer of the terms on which they will be willing to lend to that consumer. Often the dealer places the consumer in less favorable financing than the consumer qualifies for, and splits the extra profit with the lender. For example, if the lender was willing to lend to the consumer at an 8% interest rate, the dealer may place the consumer in a loan at 16% interest. The lender and dealer then split the extra money that will be paid by the consumer due to the higher interest charges.

An extremely troubling feature of dealer financing markups is their disparate racial impact. Information obtained through litigation mounted by NCLC and others has demonstrated that minority car buyers pay significantly higher dealer markups than non-minority car buyers *with the same credit scores*.⁶

⁵ Gregory Arroyo, *Payment Packing in Los Angeles*, F&I Management & Technology Magazine, February 2007.

⁶ See, e.g., Ian Ayers, Expert Report, June 2004, available at

Yet another problem is the poor mechanical condition of many used cars. Many are unreliable or even unsafe. Many such vehicles are salvage vehicles that have been previously wrecked or flooded. The dealer often knows that the car has defects but misleads the consumer about the condition of the car.

Most used cars purchased by low-income families are sold "As Is." Such cars often require repair soon after purchase. Often the cost of the repairs is more than the consumer can afford or even exceeds the value of the vehicle. As a result, the consumer is often unable to repair the car, so it does not serve the role of helping the family that the consumer envisioned when purchasing it.

Even if repairs are not required, the increasing length of used car loans, often five years or more, coupled with excessive interest rates that result from dealer markups, virtually ensure that the consumer will soon owe more than the car is worth. Many times potential car buyers will still owe more than the vehicle is worth when they must purchase a replacement. When such a customer comes in "upside down," dealers will often roll the excess amount still owed on the first vehicle into the deal for the next one and so make it even less likely that the consumer will ever have any equity in the car.

Consumers can also be caught when a dealer goes out of business. The National Automobile Dealers Association estimates that over 900 *new* car dealerships closed in 2008 and over 1,100 will close in 2009. The number of *used* car dealerships that close will likely be much higher. While the economic impact of these closures has been widely reported, the direct effect on consumers has received little attention.

Dealerships seldom shut down in an orderly fashion. Before closing, dealerships often engage in such illegal practices as failing to pay off existing loans on trade-in vehicles or selling cars to consumers without first having obtained good title. By the time the consumer discovers that the trade-in has not been paid off, or that there is a dispute over the title to a newly purchased car, the dealer will often have shut its doors and be insolvent.

IMPROVEMENTS AT THE REGULATORY LEVEL

Steps the Federal Trade Commission Should Take

The FTC is in a position to address many of the abuses of the used car market. Unfortunately, it has failed to do so. While it has provided some very valuable protections for consumers such as the "Holder" Rule,⁷ and some aspects of the Magnuson Moss Warranty Act, in other areas it has failed to adequately protect consumers.

<http://www.consumerlaw.org/issues/cocounseling/content/AHFCianAyresReportExhibits.pdf>; Cohen, Mark A. "Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation," available at <http://ssrn.com/abstract=951827>.

⁷ This Rule allows consumers defrauded by a dealer to raise the dealer's misconduct as a defense to loan repayment whenever the lender is the dealer's assignee or has a business arrangement with the dealer.⁷

The FTC's "Used Car Rule" Rule does not require any disclosure of the condition or history of the vehicle, even if the dealer knows of specific defects. The disclosure it requires about the existence or non-existence of warranty coverage is weak and misleading. The FTC has not sufficiently protected consumer from laundered lemons. The FTC has also not effectively used enforcement actions to address abuses in the sale and financing of used cars.

Improve the FTC's "Used Car Rule"

The FTC "Used Car Rule" requires dealers to disclose what, if any, warranty comes with the vehicle on a "Buyers Guide" posted on the vehicle. The Rule was created in response to an investigation by the FTC's Seattle office in the early 1970's and a subsequent report urging that the FTC require dealer inspections, disclosure of known defects, and mandatory warranties.⁸ After years of soliciting public comments and holding public hearings across the country, the FTC staff recommended mandatory inspections and disclosure of defects of certain mechanical and safety components. The FTC's original version of the rule, issued in 1981, would have required disclosure of known defects, but it never went into effect. After a Congressional veto, litigation holding the veto unconstitutional, and a change in leadership at the FTC, the Commission issued a greatly watered-down rule.

In its current form, the rule requires a somewhat misleading disclosure about whether a vehicle comes with a warranty, but it does not require dealers to inspect used cars or even to disclose defects they know about. The rule thus fails to provide any significant protections for buyers of used cars.

Even though the rule in its current form is ineffective, a strengthened Used Car Rule could be a powerful force toward eliminating unfairness and deception in used car sales. The FTC is presently reviewing the rule, so now is an opportune time to examine the possibilities for improving it. The rule should be amended.⁹ Among other things the rule should:

- Require dealers to inspect used vehicles prior to offering them for sale.

Before this rule was adopted, the lender could force the consumer to make full payment no matter how fraudulent the transaction with the dealer - even if the car was a rebuilt wreck, the dealer lacked marketable title to the car, or the car was inoperable. The rule not only protects consumers, but also gives lenders an incentive to police dealers' misconduct, since the lender will not be paid if the transaction is fraudulent.

⁸ For a discussion of the development of the Rule and the ways in which the original Rule was weakened see Mulock, Bruce K., *The FTC's Used Car Rule*, Published by the Congressional Research Service, Library of Congress, updated Oct. 14, 1983, CRS Report Number : IB81159, available at: <http://digital.library.unt.edu/govdocs/crs/permalink/meta>.

⁹ For a more complete discussion of the needed changes to the Rule see the Comments in response to the FTC's request for comments as part of its review of the rule filed on behalf of Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center on behalf of its low income clients, U.S. Public Interest Research Group, and the Watsonville Law Center, available at: <http://www.ftc.gov/os/comments/usedcarrule/536945-00015.htm>.

- Require dealers to provide written disclosure of known defects and prior use. Even those who might oppose required inspection agree that such disclosure would be best. As the National Independent Automobile Dealers Association has previously commented “NIADA believes that a beneficial balance in consumer and dealer knowledge can be achieved by means of a rule requiring a window sticker which would disclose both significant known defects and defects discovered during any state-required safety inspection.¹⁰
- Require dealers to check with warrantors to ascertain whether any warranty on the vehicle, including the manufacturer’s warranty, is still in effect and not void due to prior damage or other condition, and accurately report that information on the Buyer’s Guide.
- Require auto dealers to check the Vehicle Identification Numbers (VINs) of used vehicles they offer for sale, in the National Motor Vehicle Title Information System (NMVTIS) database, and disclose essential information from NMVTIS on the Buyer’s Guide. This would effectively put the very important information from NMVTIS where it would do the most good- in front of consumer when a car buying decision is being made.
- Require dealers to provide more detailed, complete disclosures.
- Require auto dealers to provide a separate Buyers Guide, placed on the driver’s side of the windshield, warning prospective buyers when either 1) a vehicle is designated in NMVTIS as “salvage,” “flood,” “junk” “rebuilt” or otherwise totaled, or 2) the dealer knew or should have known a vehicle was totaled by the insurer or self-insured entity.
- Remove language from the existing Buyers Guide, regarding “AS IS- NO DEALER WARRANTY” sales, which presently states that “THE DEALER WILL NOT PAY ANY COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.” This language is inherently misleading because it lends credence to the false notion that the dealer may misrepresent the condition of the vehicle with impunity. It goes beyond allowing dealers to disclaim implied warranties and creates the false impression they can lie to consumers about the condition of the vehicle or the dealer’s intent to repair the vehicle and that, if they check that box on the Guide, they avoid any liability for their statements.
- Preclude 50/50 Warranties or other dealer warranties where dealers represent they will split the cost of repairs with the customer, as qualifying as a warranty under the Buyer’s Guide. Such warranties are inherently deceptive. What appears to be warranty coverage is in fact illusory, as the warrantor can recoup all of its costs for a given “warranty” repair simply by inflating its total charge for the repair so that the consumer’s portion covers the warrantor’s entire cost.
- Require auto dealers to provide a completed translation of the Buyer’s Guide in the language used to negotiate the contract.
- Prohibit the sale of rebuilt wrecks and other problem vehicles as “certified” used cars.

¹⁰ Bruce K. Mulock, *The FTC’s Used Car Rule*, Congressional Research Service, Library of Congress, issue Brief #IB81159, update Oct. 14, 1984.

Improve the regulations under the Magnuson Moss Act

The Magnuson Moss Warranty Act regulates and standardizes written warranties. While the FTC has provided some protections for consumers through its regulations under the Act, there is room for improvement. The Act prohibits the disclaimer of implied warranties when a dealer gives a written warranty or service contract. Prior to this useful rule, many dealers would provide written warranties that actually reduced the warranties a consumer would have had with no written warranty at all. As a House report stated: "...the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead."¹¹

Dealers have tried to avoid the application of this rule by selling a service contract provided by a third party, while retaining a large portion of the sale price of the service contract, often up to 50%. Some courts have held that when a dealer sells a service contract in which a third party is ostensibly contracting with the consumer, implied warranties may still be disclaimed. Such a narrow view does not recognize the way in which the service contract is being sold by the dealer as part of the car sale. It also disregards the fact that any ambiguities in the Act should be construed in favor of the consumers, who are the intended beneficiaries of the Act.

The FTC should adopt a regulation or official interpretation stating that these courts that have protected consumers by understanding there is no difference from the consumers prospective between a dealer warranty and a third-party service contract have "got it right." The FTC should clarify that implied warranties cannot be waived when a consumer "enters into" a service contract as part of the car buying transaction. This should explicitly include selling a service contract from which the dealer or an affiliate of the dealer acquires any revenue or consideration.

As part of the Magnuson-Moss regulations, the FTC should preclude "50-50" warranties, *i.e.* warranties that are conditioned upon the consumer's payment of a percentage of the cost of the warranty work. Such warranties are inherently deceptive. What appears to be warranty coverage is in fact illusory, as the warrantor can recoup all of its costs for a given "warranty" repair simply by inflating its total charge for the repair so that the consumer's portion covers the warrantor's entire cost.

The FTC should define "50-50" warranties as deceptive. The Magnuson-Moss Act, 15 U.S.C. § 2310(c)(2), defines a deceptive warranty as one 1) that contains an affirmation, promise, description, or representation which would mislead a reasonable individual exercising due care, or 2) that uses a terms such as "guaranty" or "warranty," if the terms and conditions so limit its scope and application as to deceive a reasonable individual.

¹¹ H.R. Rep. No.93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7703-7706.

50-50 warranties are deceptive under either of these tests. The promise of repair would deceive a reasonable person exercising due care, because the illusory nature of the warranty is hidden in its formula. Likewise, the terms and conditions of the warranty limit scope and application: it allows the warrantor to raise the overall price of repairs so that the warranty provides no protection at all. This deception is likely to deceive a reasonable individual.

In the alternative, the FTC should adopt an interpretation that a 50-50 warranty is a violation of the Magnuson-Moss Act's anti-tying provision where the consumer is required to pay a portion of the dealer's charge for parts or service as a condition of the warranty. 15 U.S.C. § 2302(c) provides:

No warrantor of any consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name....

The reason for this prohibition is clear. If a warrantor can condition a warranty on the consumer's purchase of other products or services, the warrantor has the ability to make the warranty illusory. The warrantor can simply cover the costs of warranty service by charging artificially high prices for the tied product or service. Thus, allowing tying would enable warrantors to offer a warranty that in actuality provided no benefit to the consumer.

The application of this prohibition to used car 50-50 warranties is illustrated by one of the interpretations of the Magnuson-Moss Act adopted by the FTC: "Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, [the anti-tying provision] prohibits a condition that the consumer use only service (labor) identified by the warrantor to install the replacement parts."¹²

A 50-50 warranty differs from this example in that it typically provides that the consumer is to pay half of the charge for labor and half of the charge for parts, instead of all of the charge for labor and none of the charge for parts. But the principle is identical. If the warrantor can charge whatever it wants for the parts and labor, and the consumer is required to pay half of that amount, then nothing prevents the warrantor from setting the consumer's share at the full cost of the "warranty" repairs.

In 1999, the FTC, in its review of its Magnuson-Moss rules, stated that 50-50 warranties "likely violate" the Magnuson-Moss anti-tying provision.¹³ The FTC went on to state: "Since the consumer must pay a significant charge for parts and labor under these warranties, the warranties may violate section 102(c) by restricting the consumer's choices for obtaining warranty service."¹⁴

12 15 C.F.R. § 700.10(b).

13 64 Fed. Reg. 19,700, 19703 (Apr. 22, 1999).

14 *Id.*

However, after consumers in Ohio sued low-end used car dealers for conditioning warranty service on the consumer's payment of half the cost of parts and labor, the FTC was approached by dealers seeking a retraction of this statement. In 2002, the FTC issued a letter disavowing its previous statement.¹⁵

FTC should return to the position suggested by its 1999 comments. The 2002 letter does not set forth a convincing rationale for holding that 50-50 warranties do not violate the anti-tying provision. Indeed, the 2002 letter recognizes that, unlike warranties that provide parts without charge but require the consumer to pay for labor, "in a 50-50 warranty the warranted repair work is not, as a practical matter, severable into two parts, one that the warrantor can perform and another part that another auto repair shop can perform." In other words, a consumer who wishes to take advantage of a 50-50 warranty is bound--tied--to use of the warrantor's services, and payment of the warrantor's charges, whatever they may be.

Department of Justice

The National Motor Vehicle Title Information System

The Department of Justice (DOJ) has been charged with the creation of the National Motor Vehicle Title Information System. This system is a database to aid in the tracking and analyzing of vehicle title histories. It has enormous potential to protect car buyers from unwittingly buying total cars.

However, problems exist in the implementation of this system. Some states are reluctant to provide information to the database as they currently sell the same information to private reporting services for a profit.¹⁶ Reports can be difficult for consumers to understand because of the myriad of "brands" that states use to designate cars that have been salvaged, totaled, rebuilt, flooded, or otherwise damaged or changed. Consumers must access the database through private vendors. There is a fee for consumers to access the information and, at least for one vendor, that fee is payable only by credit card.

For the system to be effective, all states and other required entities must contribute information. The information should be available to consumers at a reasonable fee with a variety of payment methods for those without a credit card. Consumers should not have to pay higher prices than dealers or other volume purchasers of the information. Most importantly, as described in the recommended changes to the FTC's Used Car Rule, a NMVTIS report should be posted on every car for sale by a dealer. This would eliminate the need for the consumer to purchase the information and have the information available at the time and place it would do the most good.

¹⁵ Letter from the FTC to Keith E. Whann (Dec. 2, 2002), available at www.ftc.gov/os/2003/01/miadaresponseletter.htm.

¹⁶ Christopher Jensen, *A Used-Car Promise Finally Delivered*, New York Times Blog, January 29, 2009, available at <http://wheels.blogs.nytimes.com/2009/01/29/a-used-car-promise-finally-delivered/>.

Discrimination in Car Credit Transactions

As I explained in my description of common abuses, dealers commonly charge a “mark up” when financing a consumer’s purchase and subsequently selling the note. Dealers get a larger kickback for putting consumers in a more expensive loan than they qualify for. Such markups often have a disparate impact on minorities. The practice itself reduces transparency and competition in the market and should be prohibited by the FTC as unfair.

Even without an outright prohibition, the discriminatory impact of this practice calls for enforcement actions by the regulatory agencies. Both the FTC and the DOJ have enforcement authority under the Equal Credit Opportunity Act (ECOA) to address such issues. Despite the existence of the ECOA and the enforcement authority of the FTC and DOJ, discrimination in auto financing has continued. While changes outside these agencies that I will discuss later may make their job of enforcing the ECOA easier and more effective, both agencies should increase enforcement in this area.

The National Highway Traffic Safety Administration (NHTSA)

The Motor Vehicle Information and Cost Savings Act (MVICSA) outlaws odometer fraud, requires important disclosures, and regulates the method of transferring a vehicle’s title.¹⁷ Over 20 years ago, the National Highway Traffic Safety Administration (NHTSA) created an exemption from many of these requirements for vehicles over 10 years old and also vehicles with gross vehicle weight ratings over 16,000 pounds.¹⁸

At the time, cars over 10 years old were thought to have such little value that odometer tampering would have little impact on the vehicle’s price. But today 10 year old cars are better built and have significantly longer useful lives. Many still have significant market value after ten years if they are low-mileage, so fraudulent dealers and wholesalers have an economic incentive to roll back the odometer. Thus these older cars today are targets of odometer fraud which can cause considerable consumer injury. Buyers of these cars need the same protection under MVICSA as buyers of newer used cars.

The 16,000 pound exclusion was drafted to exempt commercial buses and trucks, which are often sold with much more extensive maintenance records than private vehicles, providing a check against odometer tampering. But today this exemption also applies to larger recreational vehicles (RVs). The higher market value of these RVs makes them even more tempting targets for odometer fraud than passenger cars, and there is no reason to exempt RVs purchased for consumer use from MVICSA’s protections. All motor vehicles for consumer use should be covered by MVICSA.

¹⁷ For more information about the MVICSA see National Consumer Law Center, *Automobile Fraud* § 4 (3d ed. 2007).

¹⁸ 49 C.F.R. § 580.17.

The NHTSA exemptions should be amended to provide coverage under MVICSA for vehicles less than twenty years old and all vehicles for consumer use, regardless of weight.

In addition, a number of courts, taking a strained view of MVICSA's legislative language, have found that consumers can sue dealers who intentionally violate the Act only if the dealers' fraudulent intent was to sell cars with spun odometers, not a fraudulent intent to sell cars with undisclosed salvage, daily rental, or other serious titling defects. This makes no policy sense, and should be changed by a statutory amendment to clarify language that other courts have correctly read—that parties are liable under MVICSA if they violate the Act with intent to defraud, even if the fraud takes a form other than odometer tampering.

LEGISLATIVE REFORM

There are a number of steps that Congress could take to address abuses in the used car market. Some are simple fixes to update existing protections. Some changes would better enable agencies to address the abuses. Others would simply prohibit the abusive practices. Some would enable consumers to better address the abuses through private actions.

Adjust TILA's Jurisdictional and Statutory Damage Amounts for Inflation

The Truth In Lending Act (TILA) requires creditors to disclose credit terms of auto finance and other credit transactions. While TILA's promise of enabling consumers to shop for credit has not been as successful as it could have been, it does give consumers essential information about a transaction's credit terms before they bind themselves to those terms.

But today TILA contains an enormous loophole. It applies to car transactions only if the amount financed is \$25,000 or less. Dealers need not provide TILA disclosures if the amount financed exceeds \$25,000. The \$25,000 cap was part of the 1968 bill that became TILA, and has not been updated in the 41 years since then.

While \$25,000 was a large amount in 1968 and would have covered almost any conceivable car purchase, today TILA does not apply to many transactions involving rather modest cars. Moreover, because the limit applies to the amount financed and not the car's sale price, negative equity from a trade-in, expensive service contracts, and other add-ons can bring the amount financed above \$25,000 even if the car's sale price is well under that amount. For a large and growing percentage of car sales, federal law no longer requires that even the most basic disclosures about the credit terms be given to the buyer.

TILA also provides for statutory damages when key disclosure requirements are violated. These minimum damages encourage the buying public to help enforce the Act's important protections. This is critical, since a disclosure violation is likely to be repeated in thousands of other transactions. In order for the statutory damages to provide an

incentive for consumers to help police the marketplace and discourage dealers and lenders from violating the Act, the damages must be sufficiently high. Unfortunately, the \$1000 statutory damages amount for car loans has also remained unchanged since 1968 (although the amount has increased for mortgage loans).

If TILA's \$25,000 coverage limit were adjusted for inflation since 1968, it today would be over \$132,000.¹⁹ The \$1,000 statutory damages amount would be over \$5,000. Not only should these amounts be increased today to reflect this inflationary change, but this increased amount should also be indexed for future inflation.

Data Reporting

One difficulty faced by policy makers, researchers, and agencies charged with enforcing credit discrimination protections is lack of information. Such information could play an invaluable role in determining the existence of discrimination in auto lending and sales, the availability of credit at fair rates, and other matters of importance to consumers and policy makers.

NCLC and others have demonstrated through litigation that minority car buyers pay significantly higher dealer markups than non-minority car buyers *with the same credit scores*.²⁰ However such cases are incredibly difficult and expensive.²¹ A federal data collection system could address this gap by creating a data from automobile financing transactions similar to the existing federal data collection for mortgage transactions under the Home Mortgage Disclosure Act (HMDA). HMDA data is currently used by the FTC in its enforcement of the ECOA in mortgage cases. Similar data could allow the FTC, DOJ, and private citizens to effectively enforce the ECOA and other existing protections in the area of auto finance.

Ban Arbitration Clauses in Auto Sales and Finance Transactions

Arbitration clauses, inserted in the fine print in many consumer contracts, require that any dispute the consumer may have with the business must be submitted to

¹⁹ See Comments of the National Consumer Law Center to the Board of Governors of the Federal Reserve System, 12 CFR Chap.II [Docket No. R-1180] regarding the Economic Growth and Paperwork Reduction Act "EGRPRA" available at:

http://www.consumerlaw.org/initiatives/test_and_comm/content/egrpra-final.pdf.

²⁰ See, e.g., Ian Ayers, Expert Report, June 2004, available at <http://www.consumerlaw.org/issues/cocounseling/content/AHFClanAyresReportExhibits.pdf>; Cohen, Mark A. "Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation." available at <http://ssrn.com/abstract=951827>.

²¹ See the testimony of NCLC before the House Financial Services Committee on the Need for Race, Age and Sex Data on Non-Mortgage Lending, July 16, 2008, stating that discovery and analysis in a case to prove discrimination under ECOA in auto finance cost over \$1,000,000. Available at http://www.consumerlaw.org/issues/credit_discrimination/content/Watt_Regulation_Testimony.pdf.

arbitration rather than court. Car dealers use arbitration clauses not to settle disputes efficiently, but to rob consumers of any effective means to challenge dealer fraud.²²

Car dealers draft arbitration clauses for the purpose of weakening consumers' ability to bring legal claims. The clause often bans consumers from seeking class-wide relief, prevents them from utilizing remedies granted by state law, and forces them to pay the *dealer's* attorney fees if the arbitrator does not rule for the consumer. Decisions made by arbitrators are typically not public, and are not subject to appeal even if the arbitrator fails to follow the law.

Unlike the nation's court system, which serves the public function of dispensing justice and is supported by public funds, arbitration is a pay-as-you-go system. Arbitration can cost the consumer thousands of dollars a day, as the arbitrator charges the parties hundreds of dollars an hour. It is typically difficult to engage in legal discovery of the dealer's files and practices in arbitration. The dealer also picks the arbitration service provider that picks the arbitrator. Because of the limitations of arbitration, and the costs involved, many consumer attorneys are unwilling to represent consumers if they are bound by an arbitration agreement.

Arbitration clauses also injure the public at large. Unlike court proceedings, arbitration decisions are not matters of public record, and the arbitration hearings are conducted in private. As a result, the public is unable to avail itself of the knowledge of bad actions by dealers and financers. While dealers and finance companies may develop an understanding of the results arbitrations produce because of their repeated involvement in arbitrations, the public and consumers are unable to see if justice is served.

Arbitration clauses are so widespread that it is often impossible to buy a car without signing an agreement giving up one's right to go to court if problems develop.²³ The dealer's arbitration clause also typically applies to the auto lender, eliminating the consumer's ability to sue it as well.

Ironically, new car dealers themselves admitted the unfairness of arbitration clauses when they successfully lobbied Congress to prevent auto manufacturers from imposing arbitration clauses on dealers.²⁴ The dealers argued that the arbitration clauses deprived them of important rights and that they suffered from unequal bargaining power when negotiating with the manufacturers.

Clearly the transaction between the low-income consumer and a car dealer or finance company is even more unequal. The use of arbitration agreements in auto sales

²² For more detailed information about the abusive use of arbitration in consumer contracts, see National Consumer Law Center, *Consumer Arbitration Agreements* (5th ed. 2007).

²³ Stephanie Mencimer, *The Quest for a Car, Sans Arbitration Clause*, Mother Jones, December 14, 2007 (describing the author's unsuccessful attempt to buy or finance a car without an arbitration clause).

²⁴ See the testimony of Gene Fondren, President of the Texas Automobile Dealers Association, before a U.S. Senate Subcommittee on March 1, 2000.

and finance agreements should be banned. There is currently pending federal legislation to ban arbitration clauses in auto sales.²⁵

Permit Modification of Car Loans in Bankruptcy

The United States Bankruptcy Code allows bankruptcy judges to modify both unsecured and secured loans. The modification may change the payment amount, defer payments, or even eliminate the creditor's lien. Modification may allow the consumer to keep an item that is acting as security on a loan and yet reduce the monthly payment. This in turn may make monthly payments affordable, allowing the consumer to keep property that other would have been taken by the lender.

In 2005, significant changes were made to the Bankruptcy Code, including restrictions on bankruptcy courts' ability to modify auto loans. Before the law changed, if a consumer owed \$12,000 on a car loan and the car was only worth \$5,000, the creditor's secured claim was reduced to \$5,000. This was the amount of the debt that was backed by the collateral that the creditor could take if the debt was not paid. The remaining \$7,000 was an unsecured claim, and only a portion of that might be paid through the bankruptcy case. Importantly, the consumer in bankruptcy could retain the car by paying off the \$5,000 secured claim. In a chapter 13, that could be paid out over a period of years.

Through the efforts of the auto finance industry, the law was changed so that auto loans made within 910 days of the bankruptcy can no longer be modified in this way. Some courts have even held that negative equity from a prior trade-in may not be modified.²⁶

This 2005 change has encouraged reckless lending. Creditors know that a borrower wishing to keep the family car in bankruptcy will have to pay the full \$12,000 debt, even though the creditor's collateral is only worth \$5000. As a result, creditors are more willing to finance cars at inflated prices--the same practices that contributed to the home mortgage crisis.

Bringing the bankruptcy law back to its pre-2005 language would eliminate the incentive for lenders to overlook consumer overcharges and roll-overs of negative equity. Instead, lenders would be likely to police dealers' unnecessary add-ons and roll-overs of negative equity. Such a change would also keep many consumers in their cars, while still repaying to lenders the actual value of the car. Allowing families to keep their cars would help keep those families self-supporting.

The FTC Should Receive Enhanced Rulemaking and Civil Penalty Authority.

²⁵ See H.R. 5312, the Automobile Arbitration Fairness Act of 2008, introduced February 7, 2008. For more information about ongoing efforts to ban arbitration clauses in auto transactions see the website of Consumers for Auto Reliability and Safety: <http://www.carconsumers.com>.

²⁶ For more information regarding this issue see: National Consumer Law Center, Consumer Bankruptcy Law and Practice 11.6.1.4 (8th ed. 2006 and Supp.)

The FTC rulemaking efforts have almost stopped since it lost Administrative Procedures Act authority. Without APA authority the FTC is forced to issue rules under the cumbersome Magnuson-Moss Act. As previously discussed, the FTC has failed to effectively use enforcement to address abuses in the used car sales and fiancé market. However, even if the FTC had the will and the resources to greatly increase enforcement, that alone will not end the abuses. Enforcement is ad-hoc, requires a high burden of proof, has a punitive nature, and cannot be used proactively to stop unfair and deceptive practices, clarify statutory ambiguities, or set clear rules for industry.

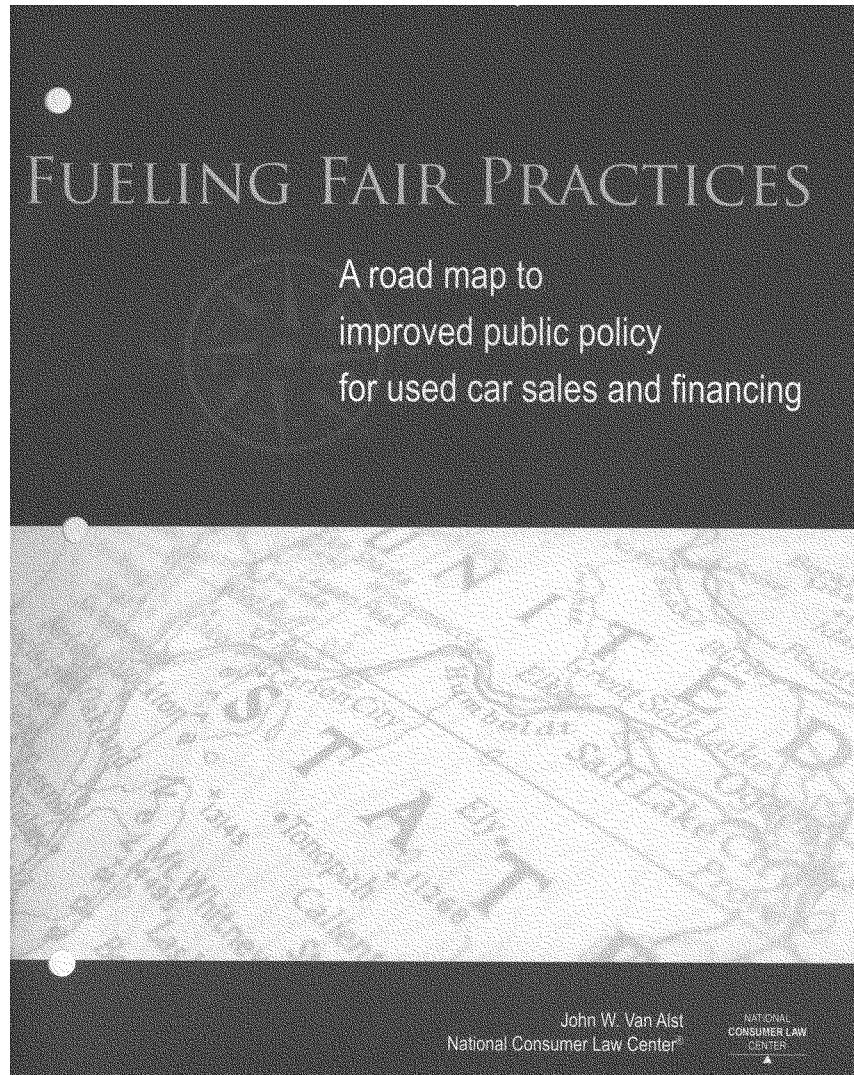
New, effective and efficient rulemaking is required to address the abuses. The FTC should be given APA rulemaking authority, as well as clear rule-writing authority under the FTC Act and the Fair Credit Reporting Act. The FTC's enforcement authority should also be strengthened by giving it civil penalty authority under Section 5 of the FTC Act.

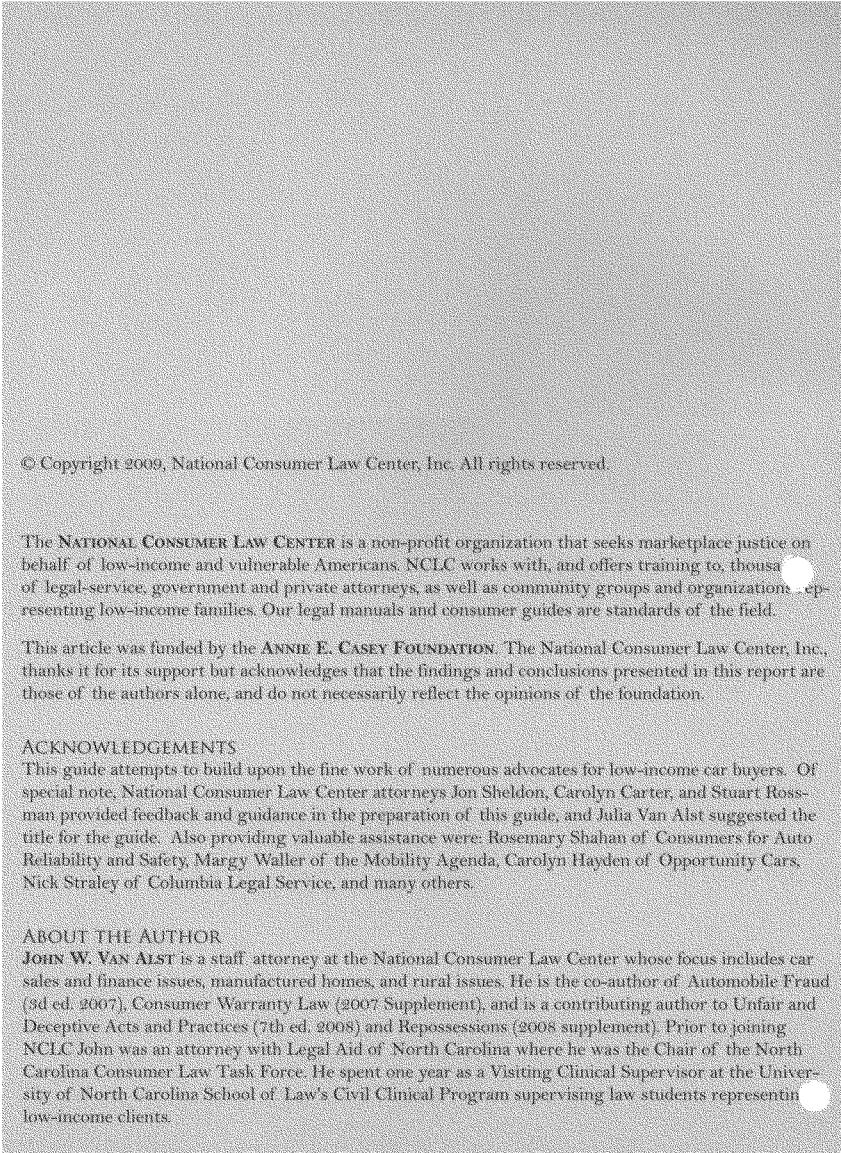
The FTC Act Should Be Enforceable by Victims of Unfair and Deceptive Practices and by State Attorneys General.

The FTC will always have limited resources and cannot stop every unfair and deceptive practice. The individuals who are harmed by those practices are in the best position to hold wrongdoers accountable, and state attorneys general are also closer to the ground and have the ability to stop practices when they are just starting, before they become national and entrenched. Individuals and attorney generals are essential complements to the FTC's enforcement role.

Conclusion

Thank you for the opportunity to testify today and for holding these hearings and focusing attention on such common practices that have a devastating impact on working families. We look forward to working with you to address these problems and ensure that consumers are treated fairly.





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The **NATIONAL CONSUMER LAW CENTER** is a non-profit organization that seeks marketplace justice on behalf of low-income and vulnerable Americans. NCLC works with, and offers training to, thousands of legal-service, government and private attorneys, as well as community groups and organizations representing low-income families. Our legal manuals and consumer guides are standards of the field.

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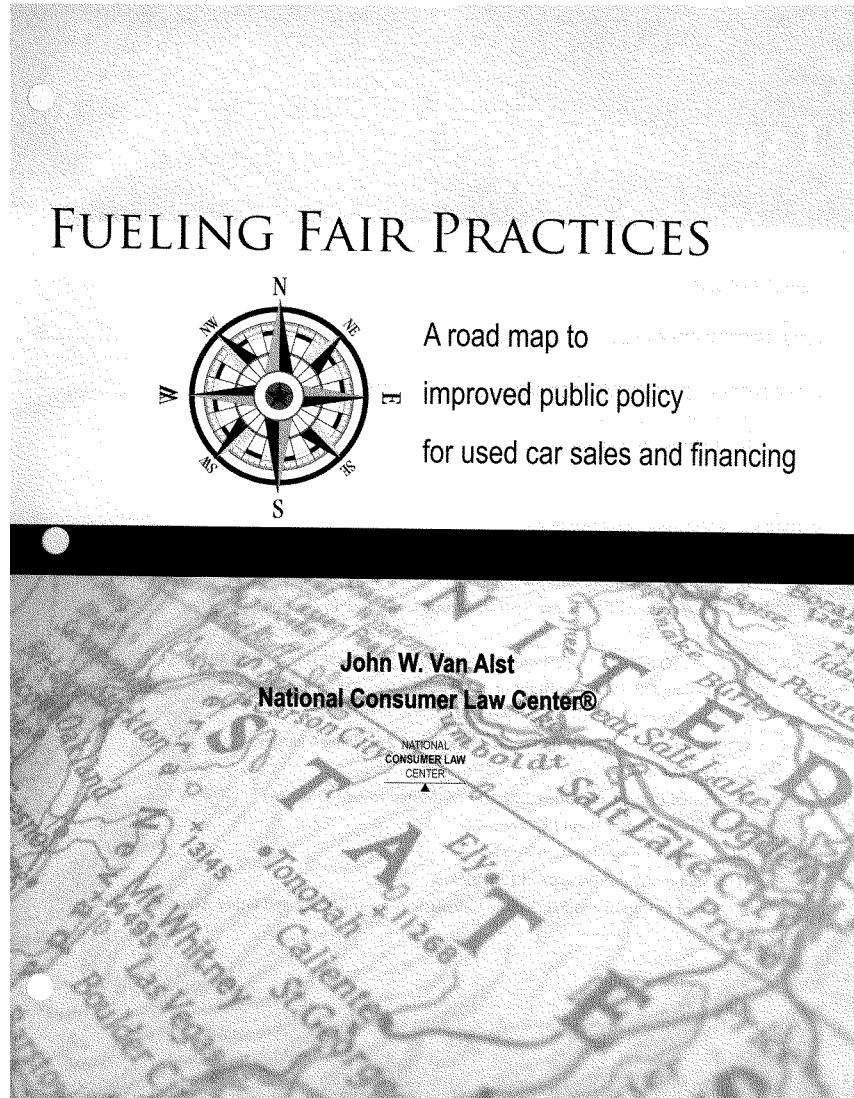
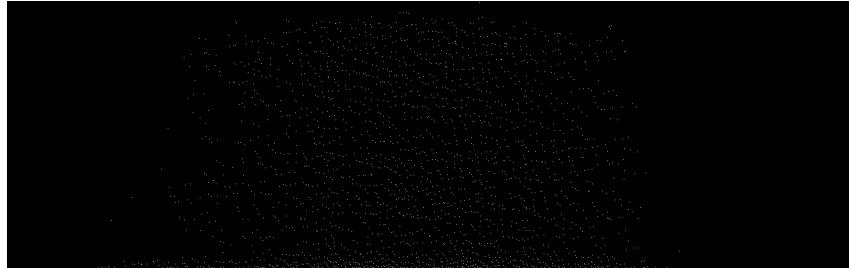


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I. EXECUTIVE SUMMARY

For most working families, owning a car is central to productivity and self-sufficiency. Yet, buying, financing, and keeping a reliable car is fraught with dangers and problems. This is especially true for low-income families. It is not surprising that households with incomes below \$25,000 are nine times more likely to be without a car than households with incomes above \$25,000.¹ While existing policies offer some protections, consumers still face numerous hurdles and stumbling blocks, such as cars in poor or even dangerous condition, unfair financing arrangements, deceptive sales practices, junk products and fees that add to a car's cost, and outright fraud.

Most Americans understand how difficult it is to obtain a fair deal when buying and financing a car. There is broad public support for policy improvements,² and a growing number of policy makers are seeking to address these issues. Reform will be welcomed not only by consumers, but even some car dealers and finance companies that would like to succeed by providing quality cars at fair terms, but cannot when competitors succeed through unfair practices.

This guide examines problems and inequalities in the current used car sales and finance market, and suggests policy reforms that would bring fairness to these transactions. Both state and federal policy improvements are suggested. There are three principles which apply to all the suggested improvements:

- Laws protecting consumers should have a private right of action.
- Dollar amounts should automatically adjust for inflation, and other numbers found in statutes should be periodically reviewed.
- Federal laws should not preempt stronger state consumer protections, nor should state laws preempt stronger local and community protections.

STATE LAW REFORMS

Protecting Used Car Buyers from Sales and Financing Abuses

The sale and financing of used cars is fraught with abuses. One change that would do much to address such abuses is instituting a right of rescission or cooling off period. Other policies states should follow to reduce

¹ U.S. Department of Transportation, Bureau of Transportation Statistics, *NHTS 2001 Highlights Report*, BTS03-05 (Washington, DC: 2003).

² In 2004, when an initial, strong, car buyer bill of rights was proposed in California, a statewide poll found that 83% of likely voters supported the measure. See California's Car Buyers Bill of Rights: A Bittersweet Deal for Consumers, Consumers for Auto Reliability and Safety, November 28, 2007, available at http://www.carconsumers.com/CBBR_BittersweetDeal.html.

such abuses include eliminating or limiting dealer finance charge markups to a dollar amount; capping document preparation and fees; and requiring posted pricing and simplified rebate calculation for add-ons.

Even when laws prohibit abuses, often dealers go out of business without the resources to protect consumers. Such closures can leave consumers without good title to a recently purchased car or still owning money on a trade-in that should have been paid off. To address these issues, states should create dealer-funded consumer compensation funds and increase existing dealer bond requirements.

Protecting Used Car Buyers from Dangerous and Unreliable Vehicles

One of the most difficult problems consumers face is trying to obtain a car in good condition. There are several alternatives states can pursue to address this issue by enacting used car lemon laws and required warranties; prohibiting disclaimer of implied warranties and "as is" sales; or requiring inspection of, and minimum condition for, used cars for sale. If such protections are created and a dispute does arise about the condition of the vehicle at the time of sale, the burden of proof should be on the dealer to show that the car was in good condition at the time of sale.

Protecting Car Buyers and the Public from Arbitrary and Dangerous Repossession

Even if families can get a reliable car, they often find it difficult to keep the car. While taking the law into one's own hands is generally disfavored, lenders have extraordinary power to take a car away from a family without protection. This leads in many cases to repossession when the lender is not entitled to the car, loss of the family's ability to get to work, and all too many instances injuries and fatalities.

States should either ban self-help repossession or restrict the use of self-help repossession. If self-help repossession is allowed in a restricted form, reposessors should be heavily regulated, including licensing and bonding, and lenders should be liable for all actions of reposessors. To help keep families in their cars and productive, consumers should be afforded a right to cure or reinstate the loan if they do fall behind. Finally, states should adjust anti-deficiency statutes for inflation.

SUGGESTED CHANGES TO FEDERAL LAW

- In order to better understand what happens when cars are sold and financed, and to combat discrimination in such transactions, a federal data collection system for automobile financing should be created similar to existing HMDA mortgage data collection.
- Pre-dispute binding arbitration should be prohibited in auto sales and financing transactions.
- The Federal Trade Commission's "used car rule" should be improved.
- Restrictions on modification of car loans in bankruptcy should be removed.
- Jurisdictional and damage amounts under the Truth in Lending Act should be adjusted for inflation.
- Impediments to proper operation of the Motor Vehicle Information and Cost Savings Act (MVICSA) should be eliminated.

III. THE IMPORTANCE OF CARS

For a majority of Americans, a car is a necessity. The design of most cities and suburbs, a lack of public transportation in both rural and urban areas, and numerous other factors make life without a car difficult if not impossible for many. A recent survey by the U.S. Department of Transportation found that 91.2% of adults commute to work using a personal vehicle.³ While changes such as an ability to telecommute, improved public transportation alternatives, and smart planning may reduce the need for cars, for the foreseeable future many Americans will need a car to be productive, engaged members of society.

This is especially true for working families with low-incomes. Families with higher incomes may have the sources and opportunities to make choices, such as living close to their places of work, obtaining in-home child care or high-cost child care near their homes, working from home, and making other lifestyle changes. These options are typically not available to low-income families.

Households with incomes below \$25,000 are nine times more likely to be without a car than households with incomes above \$25,000.⁴ This indicates that low-income families find it extremely difficult to buy and keep a reliable car. It also demonstrates that a family that does have a reliable car is much better poised to succeed economically than a family without a car.⁵

³ U.S. Department of Transportation, Bureau of Transportation Statistics, NHTS 2001 Highlights Report, BTS03-05 (Washington, DC: 2003).
⁴ U.S. Department of Transportation, Bureau of Transportation Statistics, NHTS 2001 Highlights Report, BTS03-05 (Washington, DC: 2003).
⁵ A study of one car ownership program, Good News Mountain Garage, implied that car ownership has a real impact on families' economic success. The families helped by the program all received Temporary Assistance for Needy Families (TANF) benefits. One year after receiving a vehicle, 70% of the families went off public assistance, 80% were working, and 13% were in job training. In another study of such a program the West Virginia Department of Health and Human Services found that families receiving cars through a pilot program rather than a statewide leasing program had lower recidivism rates and used their car to become economically independent. For more discussion of the effects of car ownership see <http://www.goodnewsmountainergarage.com/about.html>.

III THE CURRENT STATE OF THE USED CAR SALES AND FINANCE MARKET

A. COMMON ABUSES

Policies currently in place are generally insufficient to protect consumers when buying and financing a used car. Working families, and those that want to be working and self sufficient, understand the role a car can play in their lives and generally purchase a car hoping that it will allow them to improve their situation. All too often, a used car is a liability rather than an asset for a family, draining essential resources instead of providing a route to success and self-sufficiency. Car buyers fall victim to a number of practices that greatly reduce their ability to obtain a useful car that can meet their needs at a fair sales price with fair financing.

The way in which cars are sold and financed is intentionally structured to be needlessly complicated and time consuming in order to confuse buyers and enable dealers to charge excessive prices and fees for the car and financing. Dealers use psychological tactics to influence consumers. Often dealers force the consumer to stay at the dealership for long periods of time by keeping the potential trade-in, keeping the consumer's driver's license, or other ruses. The consumer is worn down and becomes much more susceptible to the dealer's efforts to extract excess profits from the transaction. Dealers mislead and simply lie to consumers.

Dealers also use tactics such as "yo-yo sales" to reduce any chance the consumer has of getting a fair deal. In a yo-yo sale the dealer sends the customer off the lot driving the newly purchased car only to call the customer back several days later to say (sometimes untruthfully) that financing could not be arranged at the original terms and the consumer must sign new documents at a higher interest rate or other worse terms. Of course, if the consumer, rather than the dealer, had reconsidered the transaction and wished to back out, the dealer would be quick to tell the consumer that the deal is binding and the consumer may not cancel the transaction. Sometimes the dealer will have already sold the consumer's trade-in or tell the consumer that the consumer will be responsible for extra charges and costs if the new, less desirable, terms are not accepted. Regardless of whether the dealer is being truthful, often the customer is in no position to refuse the new onerous terms.

Sometimes the dealer is simply bringing the customer back in to get an even higher interest rate or add on more profitable items to the sale. These dealers realize that consumers are more likely to agree to these terms after they already feel so invested in the deal and are reluctant to see it undone. Often the consumer has al-

ready paid additional money to third parties for insurance or improvements to the newly purchased car. Indeed sometimes the consumer's trade in has already been sold. In such circumstances the consumer often believes there is no choice but to accept the new terms presented by the dealer. Even if the dealer is truthful and was unable to find a willing lender, the consumer is still in the position of walking away from a deal after investing substantial time and money.

Dealers often structure the negotiation for the sale of a car to obscure the costs and to prevent the consumer from understanding whether he or she is getting the car at a fair price. Excess dealer profits will be hidden in add-ons such as "window etching," service contracts, rust proofing, and vastly inflated document preparation fees. If a consumer is able to uncover evidence of wrongdoing on the part of the dealer or finance company, often any meaningful compensation for the consumer or any punitive award to stop such behavior in the future will be unavailable because of language inserted in the contract denying consumers the right to go to court and forcing them to resolve any disputes in arbitration.

Financing markups by dealers create another opportunity for abuse. In most car purchase transactions, the dealer arranges the financing in addition to selling the car. Dealers typically contact prospective lenders and present the consumer's financial information. Lenders then inform the dealer of the terms on which they will be willing to lend to that consumer. Often the dealer places the consumer in less favorable financing than the consumer qualifies for, and splits the extra profit with the lender. For example, if the lender was willing to lend to the consumer at an 8% interest rate, the dealer may place the consumer in a loan at 16% interest. The lender and dealer then split the extra money that will be paid by the consumer due to the higher interest charges.

An extremely troubling feature of dealer financing markups is their disparate racial impact. Information obtained through litigation mounted by NCLC and others has demonstrated that minority car buyers pay significantly higher dealer markups than non-minority car buyers *with the same credit scores*.⁶

Yet another problem is the poor mechanical condition of many used cars. Many are unreliable or even unsafe. Many such vehicles are salvage vehicles that have been previously wrecked or flooded. The dealer often knows that the car has defects but misleads the consumer about the condition of the car.

Most used cars purchased by low-income families are sold "As Is." Such cars often require repair soon after purchase. Often the cost of the repairs is more than the consumer can afford or even exceeds the value of the vehicle. As a result, the consumer is often unable to repair the car, so it does not serve the role of helping the family that the consumer envisioned when purchasing it.

Even if repairs are not required, the increasing length of used car loans, often five years or more, coupled with excessive interest rates that result from dealer markups, virtually ensure that the consumer will soon owe more than the car is worth. Many times potential car buyers will still owe more than the vehicle is worth when they must purchase a replacement. When such a customer comes in "upside down," dealers will often roll the excess amount still owed on the first vehicle into the deal for the next one and so make it even less likely that the consumer will ever have any equity in the car.

⁶ See, e.g., Ian Ayers, Expert Report, June 2004, available at <http://www.consumerlaw.org/issues/cocounseling/content/AHFC Ian Ayres Report Exhibits.pdf>; Cohen, Mark A. "Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation," available at <http://ssrn.com/abstract=951827>.

EXISTING PROTECTIONS

There are many federal and state laws that apply to car sales. Yet these laws leave huge gaps. The existing legal framework is inadequate to protect consumers from some of the most abusive practices of dealers and finance companies. An understanding of existing protections is useful to a discussion of what additional protections are needed to create a fair marketplace for used cars and financing.

One of the most useful protections for consumers who finance cars is the Federal Trade Commission (FTC) "Holder" Rule. This Rule allows consumers defrauded by a dealer to raise the dealer's misconduct as a defense to loan repayment whenever the lender is the dealer's assignee or has a business arrangement with the dealer.⁷ Before this rule was adopted, the lender could force the consumer to make full payment no matter how fraudulent the transaction with the dealer - even if the car was a rebuilt wreck, the dealer lacked marketable title to the car, or the car was inoperable. The rule not only protects consumers, but also gives lenders an incentive to police dealers' misconduct, since the lender will not be paid if the transaction is fraudulent.

The FTC's "Used Car Rule" is far less effective.⁸ The Rule requires dealers to disclose what, if any, warranty comes with the vehicle on a "buyers guide" posted on the vehicle. Language from the guide must be incorporated into the sales contract, and if the sale is conducted in Spanish, the buyers guide and contract must be available in both English and Spanish. The rule does not require any disclosure of the condition or history of the vehicle, even if the dealer knows of specific defects, and even the disclosure it requires about the existence or non-existence of warranty coverage is weak and misleading. The weaknesses of this rule and ways to improve it are discussed in more detail in Section VIII C below.

The Uniform Commercial Code (UCC) has been enacted in every state, and it establishes a uniform framework for commercial transactions, including warranty rights and the rights of auto creditors and other secured lenders.⁹ The UCC creates implied warranties applicable to the sale of a used car by a dealer, but allows the dealer to disclaim those warranties. The UCC also allows auto lenders, if they deem the consumer in default, to repossess the car and sell it, all without a court order or government supervision and subject only to minimal standards. Some states have attempted to fill the enormous gaps in the UCC with state laws that give consumers additional rights, but the nature and effectiveness of these state laws varies dramatically from state to state.

The federal Truth in Lending Act does not regulate the substance of credit terms, but only requires the information to be provided to the consumer prior to the making of the loan so that the consumer may compare terms with other lenders and find the best deal. In theory, since the law requires disclosures to be made in a uniform way, consumers can comparison shop for credit, but car dealers commonly frustrate this goal by providing the disclosures too late in the process.¹⁰

⁷ For a thorough discussion of the rule see National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 11.6 (7th ed. 2008).

⁸ FTC Trade Regulation Rule on the Sale of Used Motor Vehicles, 16 C.F.R. pt 455.

⁹ Louisiana has adopted only part of the UCC. For more information about the warranty protections under the U.C.C. see National Consumer Law Center, *Consumer Warranty Law* (3d 008 and Supp.). For more information about the protections provided by the U.C.C. in the repossession context see National Consumer Law Center, *Repossessions* (6th ed. 2005 Supp.).

¹⁰ For more information about TILA, see National Consumer Law Center, *Truth in Lending* (6th ed. 2007).

Unfair and Deceptive Acts and Practices (UDAP) laws are general statutes that provide consumers protections from abuse and deception in the marketplace.¹¹ Such laws vary from state to state, with some statutes being effective, others having significant limitations, and yet others being essentially worthless.¹² These statutes typically do not focus on car sales or set specific requirements for them, but set general standards applicable to a broad scope of consumer transactions.

The Equal Credit Opportunity Act (ECOA) prohibits discrimination based upon certain protected classes (e.g. race, religion, nationality). It also includes some procedural requirements for credit applications and denials, such as written notice to the consumer that credit has been denied.¹³ The Act has proven extremely useful in attacking practices which discriminate against minorities in the areas of auto finance.

The Motor Vehicle Information and Cost Savings Act (MVICSA) prohibits odometer fraud and regulates the nature of title transfers. It has strong remedies, but also has been interpreted to allow several major loopholes. Many states also have odometer laws, usually closely following the federal law.

Finally, states typically have laws requiring vehicle dealers- and sometimes individual salespersons- to be licensed. Dealer licensing laws have a number of weaknesses. First, they often set only very general standards for dealers. Second, they rarely give consumers any means of obtaining redress from a dealer that violates those standards. Third, the main remedy the state licensing agency can invoke is license suspension or revocation, an all-or-nothing remedy that the licensing agency typically seeks only in the most egregious, obdurate cases. And last, state dealer licensing boards are often vulnerable to "regulatory capture," and are dominated by dealers or by individuals whose focus is on fostering car sales more than protecting consumers.

C. MARKET INTERVENTIONS

Market intervention is another approach to increase car ownership for low-income families. For example, non-profit car ownership programs use several different business models, but typically obtain used cars from the community and then either sell or give them to low-income families.¹⁴ In addition, some lenders, notably some credit unions, have made special efforts to provide fair financing to low-income borrowers, especially those whose credit histories would force them to obtain sub-prime financing.¹⁵

Such programs are very helpful to those able to take advantage of them. Unfortunately, due to the scale of the market, it is unlikely that either approach will result in fair sales and financing for more than a small percentage of low-income families. Public policy should still ensure that families buying and financing a car through the normal system of dealers receive a fair deal.

¹¹ For more information about UDAP laws see National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008).

¹² For an analysis of the strengths and weaknesses of individual state UDAP statutes, see National Consumer Law Center, *Consumer Protection in the States: A 50-State Report* (State Unfair and Deceptive Acts and Practices Statutes (Feb. 2008), available at www.consumerlaw.org.

¹³ For more information about the ECOA see National Consumer Law Center, *Credit Discrimination* (4th ed. 2005 and Supp.).

¹⁴ For information about car ownership programs see <http://www.opportunitycars.com/>.

¹⁵ For information about the efforts of credit unions in this area see <http://www.ncuf.coop/media/REAL%20Solutions/SteerClear-HowCreditUnionsHelpCarBuyersAvoidPredatoryLoans.pdf>.



While specific suggestions for state and federal policy are discussed below, there are some general principles that are applicable to all the suggested changes if they are to be effective.

A. PRIVATE RIGHT OF ACTION

Without enforcement, even the best policy solutions are ineffective. A private right of action allows consumers who are harmed by the bad actions of those selling or financing cars to bring actions on their own, based upon the dealer's misconduct. Otherwise, enforcement rests on regulators and other officials, who may lack the resources to police the many actors in the used car market. Sometimes those charged with regulating dealers are beholden to the dealers and reluctant to enforce consumer protections. While government enforcement can be extremely useful, there should also be a private right of enforcement for all consumer protections.

B. AUTOMATIC ADJUSTMENTS FOR INFLATION

When policies that protect car buyers are limited to certain dollar categories or other quantitative criteria, in time the selected amounts become obsolete. It is far better to adjust dollar amounts automatically for inflation than to engage in contentious legislative or regulatory battles each time an update is sought. Even if dollar amounts are not used, other numbers cease to be relevant, such as the weight and age limits NHTSA has applied to the disclosure requirements under the MVICSA. If these amounts can be automatically adjusted based upon outside criteria, they should be. Otherwise these amounts should periodically be reviewed to ensure the original intention of the consumer protection policy is still being met.

C. PRESERVATION OF STRONGER STATE AND LOCAL CONSUMER PROTECTIONS

As efforts are made to craft policy responses to the existing abuses in the sale and financing of used cars, care should be taken to ensure that stronger state and local protections are not preempted by either federal statutes or state law.

STATE REFORMS TO PROTECT USED CAR BUYERS FROM SALES AND FINANCING ABUSES

A. COOLING OFF PERIOD OR RIGHT OF RESCISSION

Car sales and financing transactions are intentionally structured in a needlessly complex and confusing fashion. Dealers are masters of using psychological techniques to induce consumers to agree to terms to which they would normally never agree. As any car buyer knows, dealing with the dealer can be an incredibly stressful experience and consumers often enter into agreements they very quickly regret.

A cooling off period allows a consumer to review the transaction without the high pressure of the car salesman and make sure the transaction is beneficial. Cooling off periods have been adopted and found beneficial in a number of other contexts that are subject to high-pressure tactics or where significant assets are at stake:

- Door to door sales.¹⁶
- Non-purchase money home mortgages: “This provision was enacted to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his home.”¹⁷
- Timeshare sales.¹⁸

Indeed, so many transactions provide such a right that many consumers mistakenly believe that consumers do have such a right in regards to car sales.

Throughout the European Union, consumers have the right to cancel many sales and credit transactions after a suitable time for reflection, including car sales in some countries. For example, France has a seven day right to cancel such credit transactions.¹⁹ During recent efforts to harmonize consumer protections across the E.U.,²⁰ the European Commission even released a proposed directive in 2002 that would have extended the period the consumer has to withdraw from a credit agreement, including auto finance, to fourteen days after entering the agreement.²¹

¹⁶ 16 C.F.R. § 429.

¹⁷ U.S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 264.

¹⁸ See, e.g., Part 24 of Title 13 NYCRR.

¹⁹ See Article L.311-15 C. civ.

²⁰ See Susan Marks, *Can You Cancel It?*, Citizens Advice Bureau, Dec. 2005 (examining European consumer experience with cancellation rights).

²¹ The proposal was vigorously opposed by the motor trades industry. The industry pointed out that a survey of 42 dealers in France revealed that 1.29% of consumers exercised their right under French law to cancel within seven days, and argued that extending the time period to 14 days could increase that number. (CERCA’s Opinion on *The Proposal For a European Directive On Consumer Credit*, European Council For Motor Trades and Repairs.) The fact that a right is being used by consumers is no reason to argue that it is not useful.

In addition to providing the consumer a time for thoughtful reflection about the advisability of the purchase without the pressure of the car salesman, a cooling off period can address another common practice that does tremendous harm to consumers — “yo-yo sales.” As described in Section III A, a yo-yo sale occurs when the dealer sends the customer off the lot in the newly purchased car, only to call the customer back several days later to say (sometimes untruthfully) that financing could not be arranged at the original terms and the consumer must sign new documents at a higher interest rate or other worse terms. Typically in such situations the dealer claims that the deal was binding upon the consumer at the time the papers were signed, but the dealer was free to back out of the deal if it could not find a finance company to fund the deal on the terms the dealer wanted.

A cooling off period could level the playing field, allowing both sides some specified time where both the dealer and the consumer would know the transaction is not final. It is important that there is clear disclosure of the consumer’s right to rescind and any right the dealer has to back out of the deal. Of course, if an outright ban of yo-yo sales (as recommended in Section V A) is enacted, then disclosure of the dealer’s ability to back out will be unnecessary.

An argument often put forward by those opposing a cooling off period in the auto sales and finance area is that consumers will simply take advantage of the opportunity for a free car during the cooling off period and that the cost to dealers will drive them out of business. Anyone who has ever endured the painful process of purchasing a used car from a dealer will realize that the idea that a consumer would submit to such an ordeal merely to have the car for a day or two is ludicrous. Nonetheless, such criticism of a cooling off period can be easily addressed by requiring the consumer to pay a fee approximately that of a car rental, perhaps \$30 to \$40 per day, after exercising the right to cancel. The fee should not be so high as to discourage the consumer from exercising the right. And payment of the fee should not be a precondition to canceling, but an obligation imposed upon the consumer after the cancellation has been completed. As security, dealers can require a sufficient down-payment, and deduct the daily rental charge from the down payment when it is returned to the consumer.

This recommendation addresses a cooling off period for used cars. A cooling off period for new cars might raise more legitimate concerns about the cost the dealer bears on a return. New cars which have already been sold can no longer be marketed as new and could suffer a substantial diminution in value.

B. LIMITATION ON YO-YO SALES

Yo-yo sales, also called contingent or spot delivery sales are described in section III A. Yo-yo sales cause significant consumer harm, are unnecessary, and should be banned.²² In almost all car loans, dealers are the original lender to consumers and subsequently sell or “assign” the loan to another lender. Dealers typically can quickly confirm that they will be able to assign the loan they originally extended to the consumer. If dealers

²² Several states have attempted to limit this practice, without an outright prohibition, through statutory or regulatory measures. Arizona, Colorado, Illinois, Louisiana, Virginia, Utah, and Washington have enacted yo-yo statutes. (Ariz. Rev. Stat. § 44-1371; Colo. Rev. Stat. § 6-1-708; 815 Ill. Comp. Stat. § 505/2C; La. Rev. Stat. § 32:1254(N)(3)(f); Utah Stat. § 41-3-401; Va. Code § 46.2-1530; Wash. Rev. Code § 46.70.180(4)) and a North Carolina statute has some relevance to yo-yos. N.C. Gen. Stat. § 20-75.1. Arizona, Maine, Maryland, and Michigan have issued important administrative interpretations to dealers on the subject. The Arizona Attorney General’s Automobile Advertising Guidelines (1993); Office of Consumer Credit Regulation, *Maine Creditor Update* p.8 (Issue #3, Oct./Nov. 1999), Clearinghouse No. 52,522, Maine Office of Consumer Credit Regulation, Examination of Cens Auto Group, Inc., Clearinghouse No. 52,521 (Oct. 2, 1999); Maryland Motor Vehicle Administration, “Spot Delivery” “Fronting” “MacArthur Statement” etc., Bulletin D-11 98-01, Clearinghouse No. 52,142 (Nov. 30, 1998); Letter from Murray Berman, Deputy Commissioner, Michigan Department of Consumer Protection to the licensee addressed, Clearinghouse No. 52,023 (May 22, 1989); Michigan Automobile Dealers Association, Dealer Advisory, “Spot Deliveries,” Clearinghouse No. 52,519 (Oct. 24, 1997); and Idaho and Ohio UDAP regulations provide certain minimal protections. Idaho Admin. Code 04.02.01.237; Ohio Admin. Code 109.4-3-16(A)(30); see *Braucher v. Marmonet Auto*, 2002 WL 1393570 (Ohio App. June 28, 2002) (yo-yo seller violated regulation by not having written contingency agreement). In addition, many states regulate portions of the yo-yo transaction. For example, a number of states limit a dealer’s ability to resell the consumer’s trade-in before the deal is final.

are unable to do so, they should delay execution of the sales and finance documents until the financing is secured. If they wished to allow consumers to drive the car home overnight while the dealer confirms the financing, they could certainly do so, but sales should not be contingent upon the dealer securing financing. The documents should not be executed until the dealer is comfortable that it will be able to assign the note or is willing to keep the loan that it originates.

Short of an outright prohibition on yo-yo sales, there are other steps states may take to limit the harm to consumers from contingency financing' harm to consumers. If consumers were provided a right of rescission, dealers could also be provided the same time within which to rescind the transaction, subject of course to the same fees or costs that the consumer would pay if the consumer rescinded. Even if consumers are not afforded a right of rescission generally, if a dealer is allowed to make a sale contingent upon the dealer's assignment of financing, the consumer should be permitted to cancel the transaction for the same time period as the dealer.

In any event, dealers should always be prohibited from selling a consumer's trade-in before the transaction is final. The trade-in should be returned in the same condition it was in when it was entrusted to the dealer, along with any down payment. No charges should be permitted against the consumer for the use of the car. Additionally, if dealers are permitted to conduct sales contingent upon assigning the note, the dealer should be required to use the same process for retaking the car as any lender, complying with the laws applicable to repossession. Also the consumer should not face any potential criminal charges for keeping the vehicle while the dealer follows the usual repossession procedure.

C. PROHIBITION OR LIMITS ON DEALER MARKUPS OF FINANCING CHARGES

As discussed previously in section III A, many low-income car buyers end up paying large dealer markups on the cost of financing the transaction. Typically, the consumer qualifies for a lower interest rate based upon the consumer's credit history, but the dealer does not give the consumer this information. Rather, the dealer writes the loan at a higher rate and then receives a kickback from the finance company for much of the increase. This can net the dealer thousands of dollars and cost the consumer even more, because the consumer pays not only for the dealer's kickback, but also for the portion of the increase kept by the finance company.

These markups are hidden from the consumer, and the dealer may even misrepresent that the higher rate is the best it can find for the consumer. Also a number of lawsuits (NCLC was co-counsel in many of these suits) have shown that dealers impose higher markups on minorities than on non-minorities with identical credit scores.²³ Because dealer markups are so unfair, costly to consumers, and often discriminatory, they should be prohibited.

²³ For more information see http://www.nclc.org/action_agenda/cocounseling/examples_litigation.shtml#auto.

In the alternative, markups should be strictly limited. The California "Car Buyer's Bill of Rights," which passed in 2006, limits markups to 2.5% for loans 60 months or less and 2% for longer loans. (For example, this law allows an 8% loan to be marked up to 10% or 10.5%, but no higher.) While better than no limitation, these limits still allow dealers to overcharge consumers thousands of dollars while the consumer believes the dealer is looking out for the consumer's best interest. Moreover, the California statute does not prevent dealers from charging different consumers different size markups, based on race or any other factor the dealer wishes to use. A far better limit was found in the initial California Car Buyers Bill of Rights initiative, which capped dealer markups at \$150.

An even better option would be not only to cap the permissible markup, but also to require the dealer to charge the same markup to every customer. In other words if the dealer arranges financing that provides a \$150 markup payment to the dealer, it must do so for all the car purchases for which it arranges financing. This removes the discretion from the dealer and so eliminates the possibility of discrimination.

D. CAP DOCUMENT FEES

Dealers commonly charge the consumer a substantial "document" fee as part of the purchase transaction, allegedly for the preparation of documents. These fees have been increasing in recent years and some dealers now charge over \$900. The AAA (formerly known as the American Automobile Association) estimates that the average "doc fee" in states where fees are unregulated is \$400 to \$700.²⁴

Dealers argue that these fees are necessary to comply with federal privacy and security laws. This is not the case. Other businesses do not charge such exorbitant fees and are able to comply with federal law. At least ten states cap document fees at \$100 or less,²⁵ but dealers in these states still operate profitably.

Rather than being necessary in order for the dealer to comply with requirements, high document fees are pure profit for the dealer. As John Nielsen, director of the AAA Auto Repair Network said "This is a way to try to make another \$400 or \$500 on the sale of a car."²⁶

Document preparation fees should be capped at a low dollar amount that simply reflects the cost necessary to process the documents, including notary fees and fees payable to the state associated with placing title in the consumer's name.

E. POSTED PRICING AND OTHER PROTECTIONS RELATED TO ADD-ONS

An area of enormous dealer profit and consumer abuse relates to various add-on charges that are not central to the vehicle purchase, including credit insurance, service contracts, glass etching, and rust-proofing. These items often have no fixed retail price, but are sold for whatever the dealer can get away with, and often without the consumer fully realizing how much the add-on actually costs. Consumers may be charged more than double the actual cost to the dealer for service contracts. Other items such as window etching are almost pure profit. Dealers are always looking for ways to extract additional money from consumers without the con-

²⁴ Jennifer Saranow, *Paperwork is a rising cost for car buyers*, The Wall Street Journal, Tuesday, October 03, 2006. California- \$55.00- Cal Veh Code § 11713.1; Louisiana- \$35.00- La. R.S. 6:969.18; Maryland- \$100.00- Md. TRANSPORTATION Code Ann. § 15-311.1; New York- \$45.00- N.Y. Comp. Lofes R. & Regs. Tit. 15, Section 78.19(d) (2004); Oregon- \$30.00- Or. Admin. R. 137-020-0020; Texas- \$50.00- Tex. Finance Code § 348.006; Washington- \$50.00- Rev. Code Wash. (ARCW) § 46.70.180.

²⁵ Jennifer Saranow, *Paperwork is a rising cost for car buyers*, The Wall Street Journal, Tuesday, October 03, 2006.

sumer's knowledge. In extreme cases, consumers have paid as much as \$2,000 for a pen and key chain costing the dealership \$15.²⁷

Because the price for these items is not fixed, but is simply decided by the dealer based upon the dealer's judgment as to what it can get away with, this area lends itself to discrimination. The dealership will practice opportunity pricing- changing a price for the add-on based upon what the dealer thinks the customer will pay, or not notice. It is likely that dealers rely upon race or other protected class when guessing which customers will not notice these add-ons or not raise a fuss about their inclusion.

Several policy improvements can reduce or eliminate such practices:

- All add-ons should be negotiated after agreement as to the price to purchase price of the car and the price of any add-ons should be quoted and explained as a cash price, not how much the item adds to each payment.
- All add-ons should be pre-priced and the prices should be posted at the dealership and on file with some administrative body. Any discounts should also be posted and offered to all customers. This would remove dealer discretion in each transaction which would reduce price discrimination.
- Dealers should obtain the consumer's signature on a disclosure of two different total of payments: the total with all add-ons included and a total without those add-ons so that consumers are aware of the price of the add-ons over the life of the loan.
- For add-ons supplied by a third party (such as insurance or a service contract), the posted price and the price quoted to the consumer should include not only the charge to the consumer, but the amount of that price that is being retained by the dealer. This would help the consumer determine if the item was being pushed for the consumer's well being or to line the dealer's pockets.
- Dealers should be prohibited from selling add-ons supposedly supplied by unrelated third parties, when in fact they are supplied by entities related to the dealer. This would prevent dealers from hiding their profit on an item by keeping those profits in the related entity, rather than in the dealership.

A related protection- giving the consumer the right to cancel the obligation to purchase the add-on service or item- is discussed in Section V I below.

F. INCREASE DEALER BOND REQUIREMENTS

Most states require that dealers post a bond as a precondition to doing business.²⁸ These bonds protect consumers and sometimes others in the event that the dealer is insolvent and unable to pay restitution for bad acts. While useful, existing bond requirements are far too low, typically \$50,000 or less for all claims against the dealer. Many bond amounts have not been adjusted for inflation for decades.

This issue has become especially important in recent years. The National Automobile Dealers Association estimates that over 900 *new* car dealerships closed in 2008 and over 1,100 will close in 2009. The number of *used* car dealerships that close will likely be much higher. While the economic impact of these closures has been widely reported, the direct effect on consumers has received little attention.

²⁷ Gregory Arroyo, Payment Packing in Los Angeles, *F&I Management & Technology Magazine*, February 2007.

²⁸ For a state by state listing of bond requirements see National Consumer Law Center, *Automobile Fraud Apx. C* (3d ed. 2007).

Dealerships seldom shut down in an orderly fashion. Before closing, dealerships often engage in such illegal practices as failing to pay off existing loans on trade-in vehicles or selling cars to consumers without first having obtained good title. By the time the consumer discovers that the trade-in has not been paid off, or that there is a dispute over the title to a newly purchased car, the dealer will often have shut its doors and be insolvent. In such a situation, the claims of lenders and consumers far exceed the limits of the dealer's bond.

To protect consumers, dealer bonds should be increased dramatically. The bond should assure the availability of \$500,000 for consumer claims.

G. CONSUMER COMPENSATION FUNDS

A dealer compensation fund offers many advantages when adopted along with a dealer bond requirement. A compensation fund requires annual contributions from all dealers, sufficient to provide coverage for consumer claims against insolvent dealers.

Dealer compensation funds provide a higher dollar amount of compensation for each aggrieved consumer than current bond requirements, especially when used as a supplement to existing bond requirements rather than an alternative. Since the amount each dealer contributes depends upon the number of bad actors within the pool of dealers, a fund also encourages self-regulation and self-policing by dealers. For a dealer compensation fund to be effective, decisions on consumer claims must be made by a body that is not beholden to, or influenced by, the dealers who would ultimately bear the burden of the compensation cost.

A few states, such as California, West Virginia, and Virginia, have already supplemented the protection of their dealer bonds with dealer compensation funds.²⁹ While these existing funds could be improved- some large issues such as maintaining sufficient funding to pay claims or a difficult claims process which may discourage consumers- they are the vanguard of a more effective way to protect consumers in such situations. Canada also has a similar fund for consumers victimized by auto dealers.³⁰ Such funds are even more common for certain other businesses, such as attorneys and building contractors.³¹

H. LIMITATION ON PRE-PAYMENT PENALTIES

One solution for consumers victimized by abusive and over-priced financing through a dealer is to obtain refinancing elsewhere. As discussed in Section III C, some lenders, especially credit unions, are able to provide financing for low-income families at fairer terms than dealers typically offer. While the high pressure sales techniques used by dealers often result in consumers financing through the dealership despite the availability of other less costly options, consumers can undo much of the injury later by refinancing. (One disadvantage to refinancing is that the new lender may not be subject to the FTC Holder Rule and so is not liable for the consumer's claims or defenses against the dealer.)

A major impediment to refinancing is that the initial auto loan may include a significant penalty for pre-paying it. (Pre-payment is a necessary part of any refinancing, as the proceeds of the new loan are used to pay off the original loan). Even if a loan does not include an explicit pre-payment penalty, there is still such a penalty

²⁹ See, e.g., Va. Code Ann. §§ 46.2-1527.1 to 46.2-1527.8.

³⁰ In Canada the Motor Vehicle Dealers Act provides for a Motor Vehicle Dealers Compensation Fund. For more information see http://www.omvic.on.ca/info/compfund/compfund_default.htm.

³¹ See e.g. the North Carolina Bar Client Security Fund designed to reimburse clients who have suffered financial loss as the result of dishonest conduct of lawyers.

in effect if the lender uses a formula for calculating the pay-off amount on the original loan that is unfavorable to the consumer. For example, many lenders use a calculation method called the Rule of 78s that always results in a higher pay-off amount than the more accurate actuarial method.

Before computers were widely used, lenders justified their use of the Rule of 78s because it was time consuming to calculate what the consumer owed on the more precise actuarial basis.³² Of course, the unspoken reason was that the Rule of 78s always favors the lender. With the widespread use of computers, there is no reason to use the Rule of 78s except to extract more money from borrowers than they would pay were the payoff calculated exactly.

Several states have banned the use of the Rule of 78s for all or most consumer credit contracts.³³ The Home Owners and Equity Protection Act recognizes the Rule of 78s as a pre-payment penalty and prohibits its use for high cost mortgages. Federal law also prohibits the use of the Rule of 78s for all consumer credit transactions with terms longer than 61 months, requiring instead that the creditor use "a method at least as favorable to the consumer as the actuarial method."³⁴ Unfortunately for low-income families, however, most used car loans are less than 61 months, and not within the scope of the federal prohibition.

For these reasons, prepayment penalties, including the use of the Rule of 78s to calculate the payoff amount, should be prohibited for all auto loans, regardless of length. When the payoff amount on the original loan is calculated, the buyer should receive a proportionate rebate, calculated by the actuarial method, of all interest and finance charges (whether termed "origination fees," "prepaid finance charges," or some other term). In addition, a car buyer should receive at the time of sale a useful, understandable disclosure of the right to refinance the loan without any prepayment penalty or similar cost.

I. RIGHT TO CANCEL AND FAIR REBATE CALCULATIONS FOR INSURANCE AND OTHER ADD-ONS

Section VI E lists several ways to limit abuses in the sale of add-on products, such as credit insurance, GAP insurance, and service contracts. In addition to those protections, car buyers should be allowed to cancel the add-on and receive a full rebate for some reasonable time after the sale. This is because consumers are often unaware they purchased such add-ons until the paperwork can be carefully reviewed at home. In addition, a right to cancel add-ons, combined with a prohibition of prepayment penalties, can make refinancing a much more realistic option.

States typically regulate the formula for early cancellation of insurance, and a few states specifically regulate rebates for car service contracts as well. Typically the regulations permit the use of the inaccurate Rule of 78s described above. Rebates for other add-on items are largely unregulated. Refund formulas for these items often heavily disfavor the consumer. The result is that a consumer who is sold add-ons is often locked into the deal because of the high cost of cancelling.

³² For more information about the history of the rule of 78, calculation of payoffs and the harm the rule does to consumers see National Consumer Law Center, *The Cost of Credit: Regulation, Preemption, and Industry Abuses* 5.6.3.3 (3d ed. 2005 and Supp.).

³³ For more information about the history of the rule of 78, calculation of payoffs and the harm the rule does to consumers see National Consumer Law Center, *The Cost of Credit: Regulation, Preemption, and Industry Abuses* 5.6.3.3 (3d ed. 2005 and Supp.).

³⁴ 15 U.S.C. § 1615(b).

Consumers attempting to obtain rebates on these items may run into other problems in addition to the rebate calculation. Often the party providing the coverage or service requires the consumer to notify it directly, refusing to allow cancellation if the consumer merely notifies the dealer. The provider may also fail to cancel the add-on automatically if the car is repossessed or if the loan is paid off or refinanced.

The best way to permit consumers to refinance the car purchase at fair loan terms and to cancel unwanted and unnecessary add-ons, is to allow a consumer ten days to simply notify the dealer that the consumer is canceling the add-on. The consumer would receive a full refund of the price paid, inclusive of any amount kept by the dealer. The ten day period would begin to run after the consumer's receipt of a notice of right to cancel and, in the case of insurance, service contracts, or similar products, the policy or similar document. The notice of the right to cancel should be understandable with a clear explanation of a simple method for cancellation.

Allowing consumers to cancel add-ons and receive full rebates would have many benefits. Dealers would be less likely to hard-sell these products, and would be more likely to price them fairly, if they knew that a consumer who was dissatisfied with the purchase could cancel the deal. Allowing cancellation would also encourage competition in the marketplace, as other vendors would be better able to compete for the consumer's business.

STATE REFORMS TO PROTECT USED CAR BUYERS FROM DANGEROUS AND UNRELIABLE VEHICLES

Used cars marketed to low-income families are often in poor repair and have mechanical defects. Frequently these cars have suffered previous undisclosed damage from traffic collisions or floods. All too often used cars are not only unreliable, but unsafe.

Dealers are very skilled at detecting flood and wreck damage to vehicles they purchase for resale. A person with experience repairing or inspecting cars can identify markers of wreck or flood damage within minutes. There are signs, such as slight paint overspray, that ordinary car buyers would never notice but are obvious to people with experience.³⁵

Dealers are able to buy cars with this type of damage cheaply, and then resell them at a substantial profit by failing to disclose the vehicle's adverse history. In fact, the business model of many low-end used car dealers is based on buying vehicles with wreck damage, flood damage, or serious defects, making cosmetic repairs so that lay people are unlikely to detect the problems, and then selling them without disclosure.

Many of these cars are dangerous to drive. Even if the defects are not dangerous, when a car becomes inoperable soon after a family purchases it, the family will find itself at the beginning of a downward spiral. The car is no longer an asset, but a liability. The cost of repairing the car may exceed its value, but, without repair, the car no longer serves its purpose. While the car is no longer helping the family, the car payments are still due. There are a number of policy alternatives that can prevent this turn of events.

A. USED CAR LEMON LAWS AND REQUIRED WARRANTIES

All fifty states and the District of Columbia now have some type of lemon law to protect the purchaser of a *new* car. Only six states, Hawaii, Massachusetts, Minnesota, New Jersey, New York, and Rhode Island, have lemon laws for the protection of *used* car buyers.³⁶ These laws generally provide a statutory warranty for used cars, often based upon the age or mileage of the vehicle. If the car experiences problems during the statutory warranty period, the dealer has a reasonable opportunity to fix the problem. If the dealer is unable to do so,

³⁵ For discussion of the ways in which dealers obtain the cars they sell and the ways in which many defects are obvious to dealers, see generally National Consumer Law Center, *Automobile Fraud* (3d ed. 2007).

³⁶ Haw. Rev. Stat. §§ 481J-1 to 481J-7; Mass. Gen. Laws ch. 90, § 7N½; Minn. Stat. § 325F.662; N.J. Stat. Ann. §§ 56:8-67 to 56:8-80 (West); N.Y. Gen. Bus. Law § 198-b (McKinney); R.I. Gen. Laws §§ 31-5.4-1 to 31-5.4-6.

the dealer usually must either replace the car or refund the consumer's money, whichever the consumer prefers.

Several other states, including Arizona, Connecticut, Illinois, Maine, Nevada, New Mexico, and Pennsylvania, do not force a dealer to provide a replacement car or refund after a certain number of unsuccessful repair attempts, but they do establish minimum warranties for used car sales.³⁷

Unfortunately, the warranties required both by the used car lemon laws and the other used car warranty laws are very limited in duration. Most used car lemon laws limit the warranty to 60 or 90 days. The minimum warranty laws require warranties as short as 15 days or 500 miles.³⁸ While a required warranty can be a useful protection for consumers, the warranty must be of sufficient duration that pre-existing problems manifest themselves before the warranty expires.

Some commentators have suggested that a minimum statutory warranty duration ought to be at least as long as the term of the car loan. Given the extraordinarily long terms now common in used car financing this may not be a workable solution, but it does have merit. Certainly, when financing is arranged there is an assumption by the consumer that the car will be usable at least as long as the loan must be paid. Such a warranty is likely to reduce loan defaults. As described previously, when a car stops running, the consumer is much less likely to make payments, often because the consumer is without transportation to work or is forced to use the money for repairs, or buying another car that works. Others have proposed that the length of the warranty depend on the cost of the car.

While extending warranties for the life of the loan may not be a workable solution, if such warranties are to be effective the duration should be at least 6 months or 6,000 miles. In addition an effective used car lemon or warranty law should require a warranty with broad coverage, should prohibit disclaimers, and should preserve the viability of other claims the consumer may have. New York's used car lemon law is a good example of a statute that has an explicit statement that it does not preclude other remedies.³⁹

B. PROHIBIT DISCLAIMER OF IMPLIED WARRANTIES AND "AS IS" SALES

Under the Uniform Commercial Code (UCC), a dealer's sale of a used car automatically includes an implied warranty that the car being sold is "merchantable." This warranty guarantees a basic standard of quality and that the car is fit for its ordinary purpose as transportation. However, the UCC allows the dealer to disclaim this implied warranty,⁴⁰ and invariably dealers do so, selling the vehicle "as is."

Several states, such as the District of Columbia, Maryland, Massachusetts, and West Virginia, prohibit dealers from disclaiming implied warranties in all or certain categories of used car sales. As dealers continue to operate in all these jurisdictions, clearly such a prohibition will not drive dealers out of business. In addition, since the implied warranty is part of the UCC, which has been adopted in every state except Louisiana, it is a well-accepted concept and its meaning is well-established in the courts. While simply prohibiting disclaimer of these implied warranties does not solve every consumer issue with the condition of the vehicle, it does go a long way to assuring that the car at the time it is sold meets a minimum condition of merchantability.

³⁷ Ariz. Rev. Stat. Ann. § 44-1267; Conn. Gen. Stat. §§ 42-220 to 42-226a; 815 Ill. Comp. Stat. § 505/21; Me. Rev. Stat. Ann. Tit. 10, § 1474; Nev. Rev. Stat. §§ 482.36661, 482.36662, 482.36663; 37 Pa. Code § 301.2(5) (Pennsylvania's UDAP regulation, while not strictly a warranty statute, provides that there is an implied representation in every car sale that the car is "orthy, which serves much the same function as a required warranty).

³⁸ Summaries of the warranty statutes see National Consumer Law Center, Consumer Warranty Law 15.4.6 (3d ed. 2006 and Supp.).

³⁹ N.Y. Gen. Bus. Law § 198-b(6)(2).

⁴⁰ Although Louisiana has not adopted Article 2 of the Uniform Commercial Code, which provides these warranties, it does have a similar doctrine. While vast majority of states have adopted this interpretation of the applicability of the U.C.C. to used car sales, in two states, Alabama and Texas, there exist some questionable cases that have held these implied warranties do not arise in the sale of used cars.

C. REQUIRED INSPECTION AND MINIMUM CONDITIONS OR DISCLOSURE

Some states require dealers to inspect used cars before selling them, but typically these inspections are limited to safety issues, such as lights, brakes, and turn signals, or only emission levels. A few states do go beyond safety or emission inspections, and require dealers to inspect the vehicle to determine whether it can serve as reliable transportation. Nevada dealers must inspect cars with over 75,000 miles for both safety and soundness of the engine and drive train and disclose in writing any defects that are found or reasonably should have been found.⁴¹ In New York dealers must inspect the vehicle and give the consumer a certification that the car is in satisfactory and adequate condition for highway travel.⁴²

Widespread adoption of laws such as Nevada's and New York's with some improvements would accomplish several important goals. There would be some assurance that vehicles were not only safe, but also were reasonably reliable as transportation. All used cars would have to meet a general standard which buyers could rely. Dealers would no longer be able to claim ignorance of defects that should have been apparent from an inspection. An effective law would prohibit the sale of vehicles that are not roadworthy. Such vehicles would have to be repaired before sale, or if they cannot be repaired then recycled. Mere disclosure of defects is not enough. The disclosure may not be provided before the sale finalized and written disclosures are often "explained away" by the salesman.

D. BURDEN OF PROOF ON DEALER TO SHOW CAR'S CONDITION AT TIME OF SALE

A consumer who is saddled with a lemon vehicle usually wants to return the vehicle and receive a full refund. Dealers, however, typically resist this remedy. If a dealer is forced to provide some redress for the sale of a defective used car, the dealer usually resists anything other than promising repair attempts, or replacing car with another off the lot (often overpriced and with its own defects).

The UCC remedy of "revocation of acceptance" allows a buyer to return a product such as a motor vehicle and receive a refund when the product does not conform to warranties or other promises and the defects substantially impair its value. A number of factors make it difficult for consumers to obtain this (or any) remedy, however. Roadblocks include difficulty in finding an attorney to take the case at an affordable fee, the dealer's sale of the car "as is," and arbitration clauses that prevent the consumer from taking the case to court.

Another hurdle for revocation of acceptance is that the consumer has the burden of showing that the defects existed at the time of sale (and not just during the consumer's use).⁴³ Proving that the defect existed at the time of sale can be very difficult.

A recent European Union directive addresses this issue. It allows the consumer to seek redress for any problem which makes a vehicle unfit for the purposes for which cars are normally used,⁴⁴ if the defect becomes apparent within two years from the purchase.⁴⁵ Importantly, for defects the consumer discovers within the first six months after purchase, the defect is presumed to have existed at the time of sale.⁴⁶ If the dealer believes that the defect arose after the sale, the dealer has the burden of rebutting this presumption by showing the defects were not present at the time of sale. Adopting such a rule for used car sales in the United States would go a long way toward leveling the playing field.

⁴¹ Nev. Rev. Stat. § 482.36661.

⁴² N.Y. Veh. & Traf. Law § 301 (McKinney).

⁴³ U.C.C. § 2-807(4).

⁴⁴ 1999 O.J. (L 171) 7.7, DIRECTIVE 1999/44/EC, Art. 2.

⁴⁵ 1999 O.J. (L 171) 7.7, DIRECTIVE 1999/44/EC, Art. 5.

⁴⁶ 1999 O.J. (L 171) 7.7, DIRECTIVE 1999/44/EC, Art. 5.

VII STATE REFORMS TO PROTECT CAR BUYERS AND THE PUBLIC FROM ARBITRARY AND DANGEROUS REPOSSESSION

A. CONSUMER ABUSES RELATED TO VEHICLE REPOSSESSION

Obtaining a reliable car at fair terms is only half the battle for low-income families. Keeping the car can prove just as difficult. Considering that a car is for most families a basic necessity, there are surprisingly few protections for a car owner when a lender decides to take a family's car. Every state now permits a lender, when it believes the car owner to be in default, to take a car away from the owner without any formal judicial process or the use of law enforcement, through a procedure known as "self-help" repossession. The creditor then sells the vehicle, again without court supervision.

This ability of the lender to take away the consumer's car and sell it at an unsupervised sale leaves the consumer in a very vulnerable situation. If the lender is in error and the consumer is not really in default, the consumer is still without a car and without transportation to work while the dispute plays out. Because the lender need not file a court action, if the consumer disputes the lender's repossession, this will be after the car is gone, and conceivably after it is sold.

In addition, the consumer bears the burden of trying to take the matter to court. This is highly impractical and almost never happens. Even if the family is able to file a case in court and prove that the car should not have been repossessed, it is often too late to save a job lost for lack of transportation.

Lenders, knowing they have this cudgel to wield against the consumer, often threaten repossession without process as a way of forcing the consumer to comply with their demands, whether justified or not. This tactic is especially common among buy here, pay here dealerships that act as both the lender and dealer.

In most contexts, the law does not permit private actors to take justice into their own hands; it discourages vigilantism. The story of how policy makers permitted auto lenders to take these extraordinary measures is long and interesting. Historically lenders, landlords, and others were permitted take action without judicial process because of the weakness of the legal system.

The origins of the self-help remedy for creditors as embodied in today's law go back to the Dark Ages. Self-help was tolerated because legal institutions were too weak to prevent it. ...The remedy had been totally abolished by

the time of the Norman Conquest, but the practical considerations involved in creditors' needs to protect their property caused its revival...⁴⁷

Secured creditors were permitted to take these extraordinary measures because the legal systems at the time were weak and ineffective. Today our judicial system is well equipped to protect both consumers and creditors. In other areas, there has been progress toward prohibiting unsupervised retaking of property by private parties. Historically landlords were permitted to use self help to evict holdover tenants:

It would seem that at common law the landlord had the right, after the expiration of the tenant's term, to immediately re-enter and take possession of the rented premises, and that in so doing a resort to force was legal, provided no more force was used than was actually necessary to eject the tenant. It is manifest, however, that proceedings of this kind would have a tendency to cause breaches of the peace; and, in this country especially, it is more than probable that they would frequently result from attempts by landlords to forcibly evict tenants who were unwilling to peaceably and quietly surrender possession of premises.⁴⁸

In the nineteenth and twentieth centuries there was growing concern that tenants might be unfairly dispossessed of their homes or, even if the landlord was entitled to possession, that the use of self-help to retake the property would lead to violence. A discussion from a decision at the turn of the century by the Washington State Supreme Court illustrates these concerns and is useful in analyzing auto repossession as well.

But this rule, which makes the landlord a law unto himself, is not conducive to good business principles or to good order, and for that reason is not looked upon with favor. The statutes of this state (§ 5527, Bal. Code), provide a speedy, adequate, and orderly method for a landlord to obtain possession of his property upon failure of the tenant to pay rent, or upon failure to perform any other condition or covenant contained in a lease. These statutes we think should be held to provide an exclusive remedy, notwithstanding an agreement permitting possession to be taken by force.⁴⁹

These obvious problems with the use of self-help led to widespread statutory reform in the area of landlord tenant law. Judicial procedures were created that allowed an expedited judicial process to remove a tenant in possession. Today the vast majority of states prohibit landlords from using self-help to evict residential tenants.⁵⁰

Unfortunately, the law concerning the repossession of automobiles has not developed to the same degree. In today's society, a car can be just as important to a family's survival as an apartment, and repossession without the benefit of judicial process and law enforcement officials is just as likely to lead to violence as self-help eviction. Every year, many car owners and those hired by secured creditors to reposess cars are injured or killed during attempted self-help repossession.⁵¹

⁴⁷ Wallace v. Chrysler Credit Corporation, 743 F.Supp. 1228 (W.D.Va. 1990).

⁴⁸ Entelman v. Haggard, 95 Ga. 390, 22 S.E. 545 (Ga. 1895).

⁴⁹ Spencer v. Commercial Co., 30 Wash. 520, 71 P. 53 (1902).

⁵⁰ For more discussion see Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 U.C.L.A. L. Rev. 759 (1994).

⁵¹ See, e.g., Dave Fehling, KHOU-TV News, *Think Twice before using Deadly Force* (broadcast Friday Nov. 30, 2007) (transcript available at FOX11AZ.com) (describing a car owner who shot and killed a repo man mistaking him for a car thief and subsequently committed suicide, citing the tragedy in a suicide note); Fox News: *Tot Tumbles From Repossessed Car* (Sept. 8, 2007), available at foxnews.com (a four-year-old boy jumped out of a vehicle that was being repossessed); Cathy Spaulding, *Arrest made following repo injury, Muskogee Phoenix (Okla.)* (2008 WLNR 6057037), March 31, 2008 (car owner was run over by repossession team); Steve Gonzalez, *Jury awards man who drove golf cart into his cavalier while it was being repossessed, The Madison St. Clair Record*, June 28, 2007 (man awarded compensation after suffering disabling injuries in his attempt to stop a repossession); Brian Nearing, *Tow Truck Death Probe Continues*, Times Union Albany, NY, Aug. 4, 2007 (tow truck driver struck and killed man who was trying to stop his car from being repossessed); Eric Rich and Howard Harris, *Hip-Hop Figure Killed After He Chased Tow Truck*, Washington Post, Oct. 14, 2006; B01 (a man was shot and killed trying to stop his car from being towed); Rebecca Catalan-Crist's Towing Bill Gets New Name, St. Petersburg Times, March 29, 2007 (describing the naming of a bill to regulate towing after a car owner who was fatally shot by a tow company owner); Jason Whiteley, *Wrecker passenger recounts deadly repo*, KHOU-TV Local News (broadcast Friday July 6, 2007) (repo man ran over and killed a woman while trying to repossess her car); Jennifer Hall, *Local repo man takes friendly approach*, Kansas City Star, B2, Sep. 15, 2007 ("friendly" repo man describes being hit by a car he was attempting to repossess suffering a broken pelvis, torn muscles, and internal bleeding); News 10 Now of Syracuse, *Repo Worker Shot At* (July 3, 2007, available at news10now.com); The Indy Channel, *Officers: Man Ejected, Died at Scene* (July 6, 2007, available at the indychannel.com) (man dies in accident after trying to evade repo man attempting to take his car).

B. A BAN ON SELF-HELP REPOSSESSION

— secured lender should be required to obtain a court order to seize a vehicle, and the seizure should be accomplished by law enforcement officials. This process would be similar to the existing system most jurisdictions already have for obtaining and enforcing eviction orders and seizing personal property pursuant to a court order. Such a system would both preserve the right of the consumer to raise defenses which might preclude repossession, and also minimize the likelihood of injury and death for car owners and repossession employees compared to the use of self-help.

Currently the Blackfeet Tribe and the Navajo Nation prohibit self-help repossession on the reservation,⁵² and the District of Columbia allows repossession only with the permission of the consumer immediately prior to the repossession.⁵³ In addition, until recently, Louisiana and Wisconsin also prohibited self-help repossession. Until 2006, the Wisconsin Consumer Act prohibited self-help repossession by auto lenders, and was lifted only after intense lobbying by auto lenders.⁵⁴ The industry made two major arguments for lifting the ban: that self-help repossession would only be permitted for automobiles, but not other personal property, and that consumers often failed to appear at the court proceedings the lenders were required to bring before repossession. As consumer advocates pointed out, this showed that the system was working: consumers who did not have defenses or objections did not contest the lender's case, while those who did object had a forum for resolving their objections.⁵⁵ By analogy, advocates pointed out that no one would seek to eliminate the right to vote simply because voter turnout is often low.

Protecting consumers and the general public from the dangers of self-help repossession may add some cost to lenders, but clearly would not cause a market failure depriving people of the ability to obtain cars and finance them. During the almost 35 years that the prohibition on self-help repossession was in place in Wisconsin, families were still able to buy and finance cars.

One argument that is sometimes advanced by those opposing requiring landlords and secured lenders to use court action before depriving people of home and possessions is that a court action will reflect negatively against the consumer. While there may have been some limited merit to this argument when public court records were one of the few records available to potential lenders and landlords, it is much less applicable today. The overwhelming majority of auto lenders will report a consumer default on the loan and a subsequent repossession to credit reporting agencies. The repossession reflected on the consumer's credit report will likely have as much negative impact with potential creditors as a court action to take back the car.

C. ALTERNATIVE AND ADDITIONAL POLICY REFORMS FOR REPOSSESSION

While abolishing self-help repossession should be the primary policy means of protecting car owners and public safety, alternative measures would bring at least some increase in fairness and safety. These alternatives include requiring additional steps and warnings before repossession, regulating repossession agents more strictly, and clarifying the lender's liability for the acts of the repossession. In addition, even if self-help repossession is banned, consumers should be allowed to reinstate their loans after repossession and deficiency judgment abuses should be reformed.

⁵²Ordinance # 81, Blackfeet Commercial Code; Chp 4; Navajo Nation Code tit. 7, § 621.

C. Mun. Regs. Tit. 16, § 118.

For a discussion of the changes to the repossession law see Kelly Anderson and Steve Mell, *Wisconsin's New Automobile Repossession Law*, *Wisconsin Lawyer*, Vol. 80, No. 2, Feb. 2007.

⁵⁴Letter from Stephen E. Mell, Clinic director of Wisconsin Law School's Consumer Law Litigation Clinic, to Wisconsin Governor James Doyle (March 27, 2006).

D. ADDITIONAL PROCESS BEFORE REPOSSESSION

Short of banning self-help repossession, requiring some process before repossession would provide consumer protection. Many states require some notice to the consumer before repossession, and Illinois and Wisconsin require that the creditor send not only a notice to the consumer of the default and pending repossession, but also provide the consumer a way to dispute the repossession. If the consumer asserts defenses, the creditor must go to court before repossessing the car. While this creates a process for the consumer to dispute a seizure, it is difficult to expect the consumer to ask to be sued, which is essentially what the consumer must do to dispute the matter.

E. RIGHT TO CURE

Repossession is generally available to creditors as soon as the consumer is in default. If a consumer is a day late on the car payment, the secured lender may take the car. Some states provide a "grace period" before the secured creditor may accelerate the debt and commence repossession. This can be helpful, but often the consumer is unaware of his or her exact rights in such a situation.

More helpful is the law in many states that, before a lender may repossess the vehicle, it must first provide the consumer with a notice of the default and the right to pay the missed payment and late fees within some prescribed time, such as 10-20 days.³⁶ This is also known as "curing" the default. The lender may not proceed with repossession until after the time to cure has passed.

The right to cure can help low-income families keep their cars and avoid costly repossession. It also benefits lenders: if the lender's goal is to receive payments on car loans, rather than to repossess and resell cars, the right to cure restores a car loan to performing status. It also means that the lender or repossession agent does not have to undertake a costly and often dangerous repossession.

F. PROHIBITION AGAINST PROCEEDING WITH REPOSSESSION IF CONSUMER OBJECTS

Many, although not all, of the deaths and injuries that have arisen during vehicle repossession have occurred when the repossession agent was trying to repossess the vehicle over the consumer's objection. This scenario is certainly the most dangerous, with two private parties, each of whom may be armed, trying to wrest control of a 2,000 lb. vehicle that may be moving at a high speed.

In a number of states the courts have held that a repossession agent who proceeds with a repossession over the consumer's objection can be liable to the consumer for breach of the peace. This rule only creates potential civil liability, however, plus a rule is stronger if it is stated explicitly in a state statute. While prohibiting self-help repossession altogether is preferable, it would probably save a number of lives if state law made it clear that a repossession agent must discontinue the repossession if the consumer objects in any way.

³⁶ Jurisdictions providing a right to cure include Colorado, Connecticut, District of Columbia, Iowa, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, Puerto Rico, South Carolina, South Dakota, Virginia (although very weak- no notice required) and Wisconsin.

RIGHT TO REINSTATE

After a secured lender has repossessed a family's car, the car is typically sold. The consumer has a right to redeem the vehicle by paying the total loan amount, including fees and costs associated with the repossession. Such a right is seldom of much use to low-income families as the money to pay off the full balance owed on the car is rarely available.

A more useful policy is the right to reinstate the loan. This allows the consumer to pay only the missed payments along with late fees and costs of repossession, and then get back the car and reinstate the loan.⁵⁷ An important part of the right to reinstate is that the lender must promptly notify the consumer of the right within a few days of the repossession. After receiving the notice, the consumer typically has fifteen to twenty days to reinstate the loan.

H. REGULATION OF REPOSSessORS: LICENSING AND BONDING

Repossession by private entities is a dangerous and all too often deadly activity. While banning self-help repossession is the ideal way to address these issues, at a minimum, reposessors should be required to be licensed and bonded in every state where they operate. Several states already require licensure.⁵⁸ While no panacea, strict licensing would allow continuing education of those engaged in repossession work as to the duties and dangers. Those who violate state regulations or have a history of criminal activity could be denied the right to reposess.

In addition to licensing, those engaged in repossession should be required to post sizable bonds, allowing for compensation to victims of illegal repossession, even if the reposessor lacks sufficient assets to compensate those harmed. Bonds also provide another set of eyes to monitor the activities and compliance of the reposessor, as the bonding company has a very real interest in seeing that the reposessor behaves properly.

I. CREDITOR LIABILITY FOR ACTIONS OF REPOSSessORS

Creditors typically claim that they are not liable for the bad acts of the reposessors they hire. They claim that the reposessor is an independent contractor, not under the creditor's direct control. Because self-help is such an extreme remedy, the creditor ought to remain liable for the actions of those hired to carry out its repossession. Many court decisions⁵⁹ and the UCC's Official Comments support the view that the lender is responsible for the reposessor's actions.⁶⁰ However, it would be helpful to make this explicit by statute, as already the case in the District of Columbia.⁶¹

J. ANTI-DEFICIENCY STATUTES

A lender, after reposessing a car, typically sells it, applying the sale proceeds to the debt, which now includes not only the amount still owed under the loan, but also the costs of the repossession, storage, and other costs. The consumer remains responsible for this amount, known as the deficiency. The deficiency is often astronomically high, reflecting the inflated price of the car when it was sold to the consumer, the extremely low price produced by the lender's unsupervised sale, and the costs of the other added charges.

⁵⁷ Jurisdictions with a right to reinstate include: California, Connecticut, District of Columbia, Illinois, Maryland, Mississippi, New York, Ohio, and Wisconsin.

⁵⁸ Jurisdictions that require reposessors to be licensed include Hawaii, Maine, Michigan, Nevada, New Mexico, Oregon, and Pennsylvania.

⁵⁹ See National Consumer Law Center, *Repossessions* § 13.10.4 (6th ed. 2005 and Supp.).

⁶⁰ Official Comment 3 to U.C.C. § 9-609.

⁶¹ D.C. Code § 28-3812(d).

A number of states have anti-deficiency statutes that prohibit the creditor from both retaking the car and the seeking a deficiency. Such statutes protect consumers from the low prices resulting from repossession sales and from excessive attorneys' fees, storage, and repossession fees. They also discourage dealers and lenders from structuring transactions with excessive car prices, as the lender may have to rely upon the sale of the collateral to cover the amount owed.

Unfortunately, existing statutes typically only apply to deficiencies or sales of \$1000-2000,⁶² making them largely irrelevant to today's used car market. Most of these statutes were enacted over 30 years ago, and have never been adjusted for inflation. A statute protecting transactions under \$2,000 in 1970 when adjusted for inflation, would apply to transactions under \$11,098.09 in 2008.⁶³ Existing or any new anti-deficiency statute should reflect modern prices and should then be indexed for future inflation.

Currently, the \$1,000 to \$2,000 cap in most anti-deficiency statutes refers to the original cash price of the vehicle. This is somewhat arbitrary and could even lead dealers to price cars over any limit. Even if the statutory amount is increased to \$10,000, a car that sold for \$9,000 would not be subject to any deficiency, while a car sold for \$11,000 would be subject to a full deficiency. This would be true even if more money is still owed on the less expensive car. One potential improvement is to make anti-deficiency statutes applicable to all potential deficiencies, up to the statutory amount. The amount would apply to the potential deficiency owed, rather than the sales price. The lender would only be entitled to the portion of any deficiency that is above the statutory amount.

Anti-deficiency statutes which require the lender to elect between seeking repayment of the entire debt and retaking the vehicle discourage the lender from using the possibility of repossession as a threat to intimid consumers. The statutes also provide incentives for the lender to take good care of the vehicle if it is repossessed and attempt to get the best price possible when it is sold. If the lender instead elects to seek repayment of the debt rather than repossession, the consumer still has transportation to keep a job in order to repay the lender.

Some anti-deficiency statutes that attempt to force the creditor to elect between repossession and pursuing the debt leave an enormous loophole: They allow the creditor to accomplish exactly the same result by obtaining a money judgment on the debt and then forcing a judicial sale of the car.⁶⁴ Statutes that intend to force the lender to elect between these two options should specify that if the lender brings an action on the debt rather than repossessing the car, then the car is not subject to seizure.⁶⁵

⁶² Ala. Code § 5-19-13 (\$1000); Ariz. Rev. Stat. Ann. § 44-5501(B) (\$1000); Colo. Rev. Stat. § 5-5-103(2) (\$3000); Conn. Gen. Stat. § 36a-785(g) (motor vehicles and boats with aggregate cash prices of more than \$2000); D.C. Code § 28-3812 (consumer protection) (\$2000); Fla. Stat. § 516.31 (\$2000); Idaho Code Ann. § 28-45-103 (\$1000); Ind. Code § 24-4.5-5-103 (\$1000, but adjusted periodically); Kan. Stat. Ann. § 16a-5-103(2) (\$1000); Me. Rev. Stat. Ann. tit. 9-A, § 5.103(2) (\$2800); Md. Code Ann., Com. Law § 12-626 (West) (retail installment sales) (Op. Md. Atty' Gen., Consumer Cred. Guide ¶ 97,933, 1978 Md. AG LEXIS 46 (Md. Atty' Gen. June 6, 1978) interprets this statute to prohibit deficiency judgments, unless the agreement permitted them and either the price of the goods exceeded \$2000 or the consumer exercised the statutory right to request a public auction); Md. Code Ann., Com. Law § 12-921 (revolving credit) and § 12-115 (West) (loans secured by goods) contain similar language); Mass. Gen. Laws ch. 255, § 13j (conditional sales, loans) (\$2000); Mass. Gen. Laws ch. 255B, § 20B (motor vehicle retail installment sales) (\$2000); Mass. Gen. Laws ch. 255D, § 22 (retail installment sales and services) (\$1000) (all three Massachusetts statutes provide that if collateral is destroyed or damaged prior to repossession, then the dollar limitations do not apply with regard to insurance proceeds); Minn. Stat. § 325G.22 (\$5700 as of May 1, 2004, and subject to periodic adjustment); Mo. Rev. Stat. § 408.555 (no deficiency if the original amount financed was less than \$500); Neb. Rev. Stat. § 45-104(2) (\$5000); Okla. Stat. tit. 14A § 5-103(2) (\$1000, subject to adjustment under Okla. Stat. tit. 14A, § 1-106); S.C. Code Ann. § 37-5-103 (\$1500, subject to adjustment under S.C. Code Ann. § 37-1-109(6)); Utah Crt. Ann. § 70C-7-101 (\$3000); W. Va. Code § 46A-2-119(2) (\$1000); Wis. Stat. § 425.209 (Consumer Act) (\$1000); Wyo. Stat. Ann. § 40-14-503 (\$1000).

⁶³ CPI inflation calculator available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

⁶⁴ For further discussion of this issue see National Consumer Law Center, *Repossessions* § 12.4.7 (6th ed. 2005 and Supp.)

⁶⁵ See, e.g., Ariz. Rev. Stat. Ann. § 44-5501(C); Colo. Rev. Stat. § 5-5-103; Conn. Gen. Stat. § 36a-785(h); D.C. Code § 28-3812(e)(7) (consumer protections); Idaho Code Ann. § 28-45-103; Minn. Stat. § 325G.22; S.C. Code Ann. § 37-5-103; W. Va. Code § 46A-2-119; Wis. Stat. § 425.209; see also U.C.C.C. § 5.103(6) (1968); U.C.C.C. § 5.103(7) (1974); Official Comment 6 to U.C.C.C. § 5.103 (1968); Official Comment 7 to U.C.C.C. § 5.103 (1974).



RECOMMENDED FEDERAL POLICY IMPROVEMENTS

A. ENACT A FEDERAL AUTOMOTIVE INFORMATION REPORTING ACT (FAIR)

One difficulty faced by policy makers, researchers, and others interested in the issue of auto finance is a lack of useful data about current and past auto sales and finance. Such information could play an invaluable role in determining the existence of discrimination in auto lending and sales, the availability of credit at fair rates, and other matters of importance to consumers and policy makers.

Auto sales and finance transactions are often structured in an intentionally complex and confusing way. Typically the dealer focuses the consumer's attention on monthly payments, giving the dealer great discretion in other terms such as the interest rate, sales price, and add-ons. If a consumer seems particularly concerned about one of these other areas of the transaction, the dealer will adjust the terms the consumer is not focused upon. Accordingly, it is important that any proposed data reporting system capture all this information to permit true understanding of the transaction.

A Federal Automotive Information Reporting Act (FAIR Act) could address this gap by creating a data collection system for automobile financing similar to the existing federal data collection for mortgage transactions under the Home Mortgage Disclosure Act (HMDA). Data collection should include race, gender, income, lender information, location, disposition of application, credit score, loan to value ratio, make/model of car, and terms of loan including: price of the car, amount financed, interest rate, down payment, dealer markup, add-ons, and length of the loan.

This data collection would greatly increase our understanding of the auto finance market. Currently, some information is available from proprietary sources, but the FRB is the main source of information now available publicly. Its monthly statistical releases on Finance Companies (G.20) and Consumer Credit (G.19) provide only limited information about auto finance. These releases are created from a voluntary report collected from a sample of finance companies. The raw data itself is not released; rather the information collected is used to create estimates which are then released. The FRB's Survey of Consumer Finances (SCF), issued every three years, includes financial information about U.S. families and looks at the terms of debt as well as how the lender was chosen and other relevant information. It is also based upon voluntarily supplied information, so it fails to capture negative information which lenders or dealers may be reluctant to share. Neither the monthly releases nor the SCF links information to particular lenders, so they do not allow analysis of individual lenders' practices.

Publicly and privately available data lack information about a borrower's race or other characteristics that may be used by lenders to discriminate against particular consumers. Ending discrimination against consumers on the basis of such personal characteristics was the reason for the creation of the Equal Credit Opportunity Act (ECOA).⁶⁶ As discussed in section III A, several class actions and academic studies have identified the auto finance's disparate impact on minorities in vehicle financing.

One hurdle to obtaining race-based data is the FRB's Regulation B, implementing the ECOA. Regulation B prohibits non-mortgage lenders from asking about or documenting a consumer's race, in order to stop racial discrimination. As several commentators including the Government Accountability Office have noted, requiring lenders to collect and report such data could actually assist in stopping discrimination.⁶⁷

An exception to Regulation B's prohibition on asking for or documenting of racial information has been established for mortgage lending. The Home Mortgage Disclosure Act (HMDA) and the FRB's Regulation C mandate that lenders collect certain information about their mortgage lending.⁶⁸ This data provides information about individual lenders, and is also used to create reports for different geographical areas related to census tracks. In addition to acting as an aid to document and end discrimination, the data is also intended to aid the U.S. housing market in general by showing if lenders are meeting the housing needs of the communities they serve and ways in which public and private funds may be used to better the market.

While very useful, the HMDA data collection also suffers from limitations. The data collected includes the type and purpose of the loan, the amount of the loan, the applicant's race, ethnicity and sex, and, for higher interest rate loans, the difference between the loan interest rate and the rate for comparable treasury securities. The data collected does not include other very important information about the transaction, such as loan to value ratios and credit score. A primary reason for omitting this information appears to be a concern for consumer's privacy. The issue was addressed in a Federal Reserve Bulletin:

The potential for compromising consumer privacy is also a consideration. More than 90 percent of the loan records in a given year's HMDA data are unique – that is, an individual lender reported only one loan in a given census tract for a specific loan amount. These unique loan records can be matched with other publicly available information, such as property deed records, to determine the identities of individual borrowers. With such a match, any data item in the HMDA data, such as loan pricing, becomes publicly known... Expanding HMDA to include data items such as credit scores that may be considered highly personal would likely also raise privacy concerns.⁶⁹

The issue of privacy would not present the same obstacles in the area of auto finance. There are over 250 million cars registered in the United States.⁷⁰ About 44 million used cars and almost 17 million new vehicles are sold each year.⁷¹ The majority of these transactions are financed, with many more applications than completed transactions. By contract, in 2004, HMDA disclosures revealed only about 28.1 million applications for home mortgages.⁷² In addition, much less information about auto sales and financing is typically available

⁶⁶ "It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to [sex, marital status, race, religion, national origin and age]." Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974).

⁶⁷ U.S. Government Accountability Office, *Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending*, GAO-08-698 (June 2008).

⁶⁸ For a discussion of HMDA and its usefulness in proving credit discrimination see National Consumer Law Center, *Credit Discrimination §4.4.5* (4th ed. 2005 and Supp.).

⁶⁹ "New Information Reported under HMDA and Its Application in Fair Lending Enforcement," *Federal Reserve Bulletin*, Summer 2005, p. 367.

⁷⁰ U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, National Transportation Statistics, available at http://www.bts.gov/publications/national_transportation_statistics.

⁷¹ Automotive News Data Center, CNW Marketing/Research, and ADESA Analytical Services.

⁷² "New Information Reported under HMDA and Its Application in Fair Lending Enforcement," *Federal Reserve Bulletin*, Summer 2005.

publicly when compared to real estate transactions. The higher number of auto loans made each year and the fact that less information about most auto finance transactions is publicly available would make it less likely that particular data could be tied to an individual transaction.

B. BAN ARBITRATION CLAUSES IN AUTO SALES AND FINANCE TRANSACTIONS

Arbitration clauses, inserted in the fine print in many consumer contracts, require that any dispute the consumer may have with the business must be submitted to arbitration rather than court. Car dealers use arbitration clauses not to settle disputes efficiently, but to rob consumers of any effective means to challenge dealer fraud.⁷³

Car dealers draft arbitration clauses for the purpose of weakening consumers' ability to bring legal claims. The clause often bans consumers from seeking class-wide relief, prevents them from utilizing remedies granted by state law, and forces them to pay the *dealer's* attorney fees if the arbitrator does not rule for the consumer. Decisions made by arbitrators are typically not public, and are not subject to appeal even if the arbitrator fails to follow the law.

Unlike the nation's court system, which serves the public function of dispensing justice and is supported by public funds, arbitration is a pay-as-you-go system. Arbitration can cost the consumer thousands of dollars a day, as the arbitrator charges the parties hundreds of dollars an hour. It is typically difficult to engage in legal discovery of the dealer's files and practices in arbitration. The dealer also picks the arbitration service provider that picks the arbitrator. Because of the limitations of arbitration, and the costs involved, many consumer attorneys are unwilling to represent consumers if they are bound by an arbitration agreement.

Arbitration clauses also injure the public at large. Unlike court proceedings, arbitration decisions are not matters of public record, and the arbitration hearings are conducted in private. As a result, the public is unable to avail itself of the knowledge of bad actions by dealers and financers. While dealers and finance companies may develop an understanding of the results arbitrations produce because of their repeated involvement in arbitrations, the public and consumers are unable to see if justice is served.

Arbitration clauses are so widespread that it is often impossible to buy a car without signing an agreement giving up one's right to go to court if problems develop.⁷⁴ The dealer's arbitration clause also typically applies to the auto lender, eliminating the consumer's ability to sue it as well.

Ironically, car dealers themselves admitted the unfairness of arbitration clauses when they successfully lobbied Congress to prevent auto manufacturers from imposing arbitration clauses on dealers.⁷⁵ The dealers argued that the arbitration clauses deprived them of important rights and that they suffered from unequal bargaining power when negotiating with the manufacturers.

Clearly the transaction between the low-income consumer and a car dealer or finance company is even more unequal. The use of arbitration agreements in auto sales and finance agreements should be banned. There is currently pending federal legislation to ban arbitration clauses in auto sales.⁷⁶

⁷³ For more detailed information about the abusive use of arbitration in consumer contracts, see National Consumer Law Center, *Consumer Arbitration Agreements* (5th ed. 2007).

⁷⁴ See Charlie Mencimer, *The Quest for a Car, Sans Arbitration Clause*, Mother Jones, December 14, 2007 (describing the author's unsuccessful attempt to buy or finance a car without an arbitration clause).

⁷⁵ See the testimony of Gene Fondren, President of the Texas Automobile Dealers Association, before a U.S. Senate Subcommittee on March 1, 2000.

⁷⁶ See H.R. 5312, the Automobile Arbitration Fairness Act of 2008, introduced February 7, 2008.

For more information about ongoing efforts to ban arbitration clauses in auto transactions see the website of Consumers for Auto Reliability and Safety: <http://www.carconsumers.com>.

C. IMPROVE THE FTC'S "USED CAR RULE"

The FTC "Used Car Rule" requires dealers to disclose what, if any, warranty comes with the vehicle on a "buyers guide" posted on the vehicle. The Rule was created in response to an investigation by the FTC's Seattle office in the early 1970's and a subsequent report urging that the FTC require dealer inspections, disclosure of known defects, and mandatory warranties.⁷⁷ After years of soliciting public comments and holding public hearings across the country, the FTC staff recommended mandatory inspections and disclosure of defects of certain mechanical and safety components. The FTC's original version of the rule, issued in 1981, would have required disclosure of known defects, but it never went into effect. After a Congressional veto, litigation holding the veto unconstitutional, and a change in leadership at the FTC, the Commission issued a greatly watered-down rule.

In its current form, the rule requires a somewhat misleading disclosure about whether a vehicle comes with a warranty, but it does not require dealers to inspect used cars or even to disclose defects they know about. The rule thus fails to provide any significant protections for buyers of used cars.

Even though the rule in its current form is ineffective, a strengthened Used Car Rule could be a powerful force toward eliminating unfairness and deception in used car sales. The FTC is presently reviewing the rule, so now is an opportune time to examine the possibilities for improving it. The rule should be amended⁷⁸ so as to:

- Require dealers to inspect used vehicles prior to offering them for sale.
- Require dealers to provide written disclosure of known defects and prior use.
- Require dealers to check with warrantors to ascertain whether any warranty on the vehicle, including the manufacturer's warranty, is still in effect and not void due to prior damage or other condition, and accurately report that information on the Buyer's Guide.
- Require auto dealers to check the Vehicle Identification Numbers (VINs) of used vehicles they offer for sale, in the National Motor Vehicle Title Information System (NMVTIS) database, and disclose essential information from NMVTIS on the Buyer's Guide.
- Require dealers to provide more detailed, complete disclosures.
- Require auto dealers to provide a separate Buyers Guide, placed on the driver's side of the windshield, warning prospective buyers when either 1) a vehicle is designated in NMVTIS as "salvage," "flood," "junk" "rebuilt" or otherwise totaled, or 2) the dealer knew or should have known a vehicle was totaled by the insurer or self-insured entity.
- Remove language from the existing Buyers Guide, regarding "AS IS- NO DEALER WARRANTY" sales, which presently states that "THE DEALER WILL NOT PAY ANY COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." This language is inherently misleading because it lends credence to the false notion that the dealer may misrepresent the condition of the vehicle with impunity. It goes beyond allowing dealers to disclaim implied warranties and creates the false impression they can lie to consumers about the condition of the vehicle or the dealer's intent to repair the vehicle and that, if they check that box on the Guide, they avoid any liability for their statements.

⁷⁷ For a discussion of the development of the Rule and the ways in which the original Rule was weakened see Mulock, Bruce K., *The FTC's Used Car Rule*, Published by the Congressional Research Service, Library of Congress, updated Oct. 14, 1983, CRS Report Number : IB81159, available at: <http://digital.library.unt.edu/govdocs/crs/permalink/meta>. The rule filed on behalf of Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center on behalf of its low income clients, U.S. Public Interest Research Group, and the Watsonville Law Center, available at: <http://www.ftc.gov/os/comments/usedcarrule/536945-00015.htm>.

⁷⁸ For a more complete discussion of the needed changes to the Rule see the Comments in response to the FTC's request for comments as part of its review of the rule filed on behalf of Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center on behalf of its low income clients, U.S. Public Interest Research Group, and the Watsonville Law Center, available at: <http://www.ftc.gov/os/comments/usedcarrule/536945-00015.htm>.

- Preclude 50/50 Warranties or other dealer warranties where dealers represent they will split the cost of repairs with the customer, as qualifying as a warranty under the Buyer's Guide. Such warranties are inherently deceptive. What appears to be warranty coverage is in fact illusory, as the warrantor can recoup all of its costs for a given "warranty" repair simply by inflating its total charge for the repair so that the consumer's portion covers the warrantor's entire cost.
- Require auto dealers to provide a completed translation of the Buyer's Guide in the language used to negotiate the contract.
- Prohibit the sale of rebuilt wrecks and other problem vehicles as "certified" used cars.
- Strengthen enforcement of the Rule, and make enforcement of the Rule a top priority for the agency.

D. PERMIT MODIFICATION OF CAR LOANS IN BANKRUPTCY

The United States Bankruptcy Code allows bankruptcy judges to modify both unsecured and secured loans. The modification may change the payment amount, defer payments, or even eliminate the creditor's lien. Modification may allow the consumer to keep an item that is acting as security on a loan and yet reduce the monthly payment. This in turn may make monthly payments affordable, allowing the consumer to keep property that other would have been taken by the lender.

In 2005, significant changes were made to the Bankruptcy Code, including restrictions on bankruptcy courts' ability to modify auto loans. Before the law changed, if a consumer owed \$12,000 on a car loan and the car was only worth \$5,000, the creditor's secured claim was reduced to \$5,000. This was the amount of the debt that was backed by the collateral that the creditor could take if the debt was not paid. The remaining \$7,000 was an unsecured claim, and only a portion of that might be paid through the bankruptcy case. Importantly, the consumer in bankruptcy could retain the car by paying off only the \$5,000 secured claim. In a chapter 13, that could be paid out over a period of years.

Through the efforts of the auto finance industry, the law was changed so that auto loans made within 910 days of the bankruptcy can no longer be modified in this way. Some courts have even held that negative equity from a prior trade-in also may not be modified.⁷⁹

This 2005 change has encouraged reckless lending. Creditors know that a borrower wishing to keep the family car in bankruptcy will have to pay the full \$12,000 debt, even though the creditor's collateral is only worth \$5000. As a result, creditors are more willing to finance cars at inflated prices—the same practices that contributed to the home mortgage crisis.

Bringing the bankruptcy law back to its pre-2005 language would eliminate the incentive for lenders to overlook consumer overcharges and roll-overs of negative equity. Instead, lenders would be likely to police dealers' unnecessary add-ons and roll-overs of negative equity. Such a change would also keep many consumers in their cars, while still repaying to lenders the actual value of the car. Allowing families to keep their cars would help keep those families self-supporting.

more information regarding this issue see: National Consumer Law Center, Consumer Bankruptcy Law and Practice 11.6.1.4 (8th ed. 2006 and Supp.)

E. THE NATIONAL MOTOR VEHICLE TITLE INFORMATION SYSTEM

In 1992, Congress passed a bill mandating the creation of the National Motor Vehicle Title Information System to consist of a database designed to aid in the tracking and analyzing of vehicle title histories. States, junk yards, and insurance companies would be required to report on totaled vehicles. Car buyers would be able to access the database to determine if a car they are thinking of purchasing is a salvage vehicle or a stolen vehicle. Originally, the Department of Transportation was charged with developing and implementing the system. In 1996 that responsibility was moved to the Department of Justice.

Despite the many years since the legislation was passed, little progress had been made in creating this useful system. In 2008, a number of groups including Consumers for Auto Reliability and Safety (CARS) and Public Citizen brought a court action seeking to force the Justice Department to create the database. These groups obtained a court order requiring the Department of Justice to proceed with the database.⁸⁰ As the system becomes operational, new issues have arisen.

Some states, particularly California and New York, are reluctant to provide information to the database as they currently sell the same information to private reporting services for a profit.⁸¹ Reports can be difficult for consumers to understand because of the myriad of "brands" that states use to designate cars that have been salvaged, totaled, rebuilt, flooded, or otherwise damaged or changed. Consumers must access the database through private vendors. There is a fee for consumers to access the information and, at least for one vendor, that fee is payable only by credit card.

For the system to be effective all states and other required entities must contribute information. The information should be available to consumers at a reasonable fee with a variety of payment methods for those without a credit card. Consumers should not have to pay higher prices than dealers or other volume purchasers for the information. Most importantly, as described in section VIII C, a NMVTIS report should be posted on every car for sale by a dealer. This would eliminate the need for the consumer to purchase the information and have the information available at the time and place it would do the most good.

F. ADJUST TILA'S JURISDICTIONAL AND STATUTORY DAMAGE AMOUNTS FOR INFLATION

As described in section III B, the Truth In Lending Act (TILA) requires creditors to disclose credit terms of auto finance and other credit transactions. While TILA's promise of enabling consumers to shop for credit has not been as successful as it could have been, it does give consumers essential information about a transaction's credit terms of a transaction before they bind themselves to those terms.

But today TILA contains an enormous loophole. It applies to car transactions only if the amount financed is \$25,000 or less. Dealers need not provide TILA disclosures if the amount financed exceeds \$25,000. The \$25,000 cap was part of the 1968 bill that became TILA, and has not been updated in the 41 years since then.

While \$25,000.00 was a large amount in 1968 and would have covered almost any conceivable car purchase, today TILA does not apply to many transactions involving rather modest cars. Moreover, because the limit applies to the amount financed and not the car's sale price, negative equity from a trade-in, expensive service contracts, and other add-ons can bring the amount financed above \$25,000 even if the car's sale price is well under that amount. For a large and growing percentage of car sales, federal law no longer requires that even the most basic disclosures about the credit terms be given to the buyer.

⁸⁰ For more information see: <http://www.citizen.org/litigation/forms/cases/CaseDetails.cfm?cID=457>

⁸¹ Christopher Jensen, A Used-Car Promise Finally Delivered, New York Times Blog, January 29, 2009, available at <http://wheels.blogs.nytimes.com/2009/01/29/a-used-car-promise-finally-delivered/>.

TILA also provides for statutory damages when key disclosure requirements are violated. These minimum damages encourage the buying public to help enforce the Act's important protections. This is critical, since a disclosure violation is likely to be repeated in thousands of other transactions. In order for the statutory damages to provide an incentive for consumers to help police the marketplace and discourage dealers and lenders from violating the Act, the damages must be sufficiently high. Unfortunately, the \$1000 statutory damages amount for car loans has also remained unchanged since 1968 (although the amount has increased for mortgage loans).

If TILA's \$25,000 coverage limit were adjusted for inflation since 1968, it today would be over \$132,000.⁸² The \$1,000 statutory damages amount would be over \$5,000. Not only should these amounts be increased today to reflect this inflationary change, but this increased amount should also be indexed for future inflation.

G. STRENGTHEN THE MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT

The Motor Vehicle Information and Cost Savings Act (MVICSA) outlaws odometer fraud, requires important disclosures, and regulates the method of transferring a vehicle's title.⁸³ Over 20 years ago, the National Highway Traffic Safety Administration (NHTSA) exempted from many of these requirements for vehicles over 10 years old and also vehicles with gross vehicle weight ratings over 16,000 pounds from many of these requirements.⁸⁴

At the time, cars over 10 years old were thought to have such little value that odometer tampering would have little impact on the vehicle's price. But today 10 year old cars are better built and have significantly longer useful lives. Many still have significant market value after ten years if they are low-mileage, so fraudulent dealers and wholesalers have an economic incentive to roll back the odometer. Thus these older cars today are targets of odometer fraud which can cause considerable consumer injury. Buyers of these cars need the same protection under MVICSA as buyers of newer used cars.

The 16,000 pound exclusion was drafted to exempt commercial buses and trucks, which are often sold with much more extensive maintenance records than private vehicles, providing a check against odometer tampering. But today this exemption also applies to larger recreational vehicles (RVs). The higher market value of these RVs makes them even more tempting targets for odometer fraud than passenger cars, and there is no reason to exempt RVs purchased for consumer use from MVICSA's protections. All motor vehicles for consumer use should be covered by MVICSA.

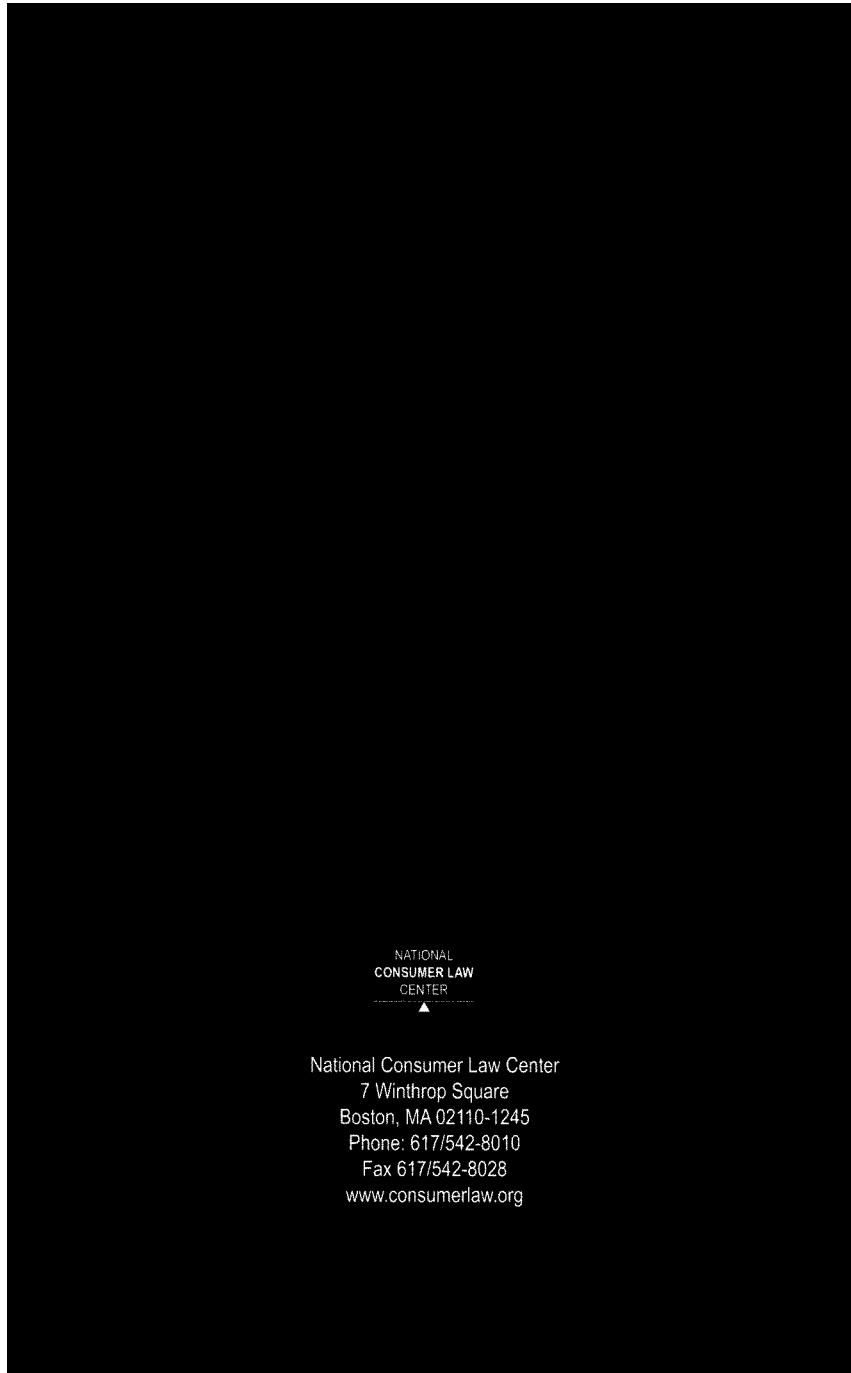
The NHTSA exemptions should be amended to provide coverage under MVICSA for vehicles less than twenty years old and all vehicles for consumer use, regardless of weight.

In addition, a number of courts, taking a strained view of MVICSA's legislative language, have found that consumers can sue dealers who intentionally violate the Act only if the dealers' fraudulent intent was to sell cars with spun odometers, not a fraudulent intent to sell cars with undisclosed salvage, daily rental, or other serious titling defects. This makes no policy sense, and should be changed by a statutory amendment to clarify language that other courts have correctly read—that parties are liable under MVICSA if they violate the Act with intent to defraud, even if the fraud takes a form other than odometer tampering.

⁸² Comments of the National Consumer Law Center to the Board of Governors of the Federal Reserve System, 12 CFR Chap. II [Docket No. R-1180] regarding the Economic Growth and Paperwork Reduction Act "EGRPRA" available at: http://www.consumerlaw.org/initiatives/test_and_comm/content/egrpра-final.pdf.

⁸³ For more information about the MVICSA see National Consumer Law Center, Automobile Fraud § 4 (3d ed. 2007).

⁸⁴ 49 C.R. § 580.17.



Mr. RUSH. Thank you very much.

The chair now recognizes Mr. Keith Whann from the National Independent Automobile Dealers Association.

TESTIMONY OF KEITH WHANN

Mr. WHANN. Mr. Chairman, members of the subcommittee, it is my pleasure to offer oral testimony on behalf of myself in my capacity as general counsel to the National Independent Auto Dealers Association here today.

My career in the motor vehicle industry has spanned the last 25 years while NIADA has represented independent, non-franchised motor vehicle dealers for over 60 years. NIADA and its State affiliated associations represent more than 20,000 dealers located across the United States. We recognize how vitally important the motor vehicle industry is and the impact the used motor vehicle segment of the industry has on our economy. There are currently about 249 million motor vehicles on the road, the median age of which is approximately 8-1/2 years. There are approximately 40 million retail used motor vehicle transactions per year roughly split between franchised dealers, independent dealers and private individuals.

Used motor vehicles, because of what they are, carry a history of use and condition. During the process of trade among these vehicles, consumers and dealers alike need access to accurate, timely information about the history and condition of the vehicles. This information affects how much either will pay for the vehicle. This is particularly important to consumers because outside of housing, it often represents the largest single purchase that they will make. In a dealer's case, his ability to pass on timely and accurate information to a consumer means the difference between developing a consumer that will refer new business to him and having a consumer full of ill will who at a minimum drives business away from him.

It should be no secret that the motor vehicle industry is one of the most heavily regulated in the country with a maze of overlapping and sometimes conflicting federal and State legislation and implemented regulations. Unfortunately, the good intentions that inspired these efforts have in large part created an increase in the cost of motor vehicles and in many instances led to confusion on the part of the consumer and frustration for dealers. Nevertheless, tens of thousands of businesses have developed practices and procedures that allow them to carry on commerce within the confines of those restrictions. Therefore, we do not advocate comprehensive overnight change in this area but gradual change is needed for the benefit of both the consumer and the dealer. I will be happy, Mr. Chairman, to work on behalf of NIADA with those responsible for making the changes if that should be your desire.

My entire professional career has focused on motor vehicles, consumer protection issues and the motor vehicle industry as a whole. In considering my written testimony, I realize I could discuss dozens of issues affecting consumers in the used motor vehicle industry including everything from advertising issues and car buyer bills of rights to spot deliveries in the finance and insurance process as a whole, all of which would have merit. However, I elected to comment upon four issues that are currently at the forefront of the

motor vehicle industry at the national level: warranties, including what they are and how they are created and disclosed, the FTC Used Car Rule, including the content of the form itself and complications that arise from its completion, financing of motor vehicle transactions, and the tax treatment of a buy-here, pay-here transaction.

Touching on this last issue, in these uncertain economic times, it has become increasingly difficult for capital to flow from lenders to credit-impaired consumers for the purchase of a used motor vehicle. A person's credit can become impaired for various reasons, often as a result of some event over which they have no control such as loss of a job, health-related issues or other family circumstances. Likewise, new families just starting out may not have established credit and may have difficulty obtaining financing. For all of these people, a car is not a luxury but a necessity. Because of these considerations, I am suggesting that a mechanism needs to be implemented as soon as possible to incentivize sales of used motor vehicles. An easy and inexpensive way to accomplish this is to permit used motor vehicle dealers like similarly sized businesses to utilize a modified cash or installment sale method of accounting for transactions that the dealers finance for their customers. Permitting such modification would provide customers with impaired credit or no credit access to additional financing sources for their used motor vehicle purchases.

While preparing for this hearing, I could not help reflect on instances where at least at first impression cooperative resolution of competing issues might not have seemed possible. Working with the National Highway Traffic Safety on the implementation of the Anti-Car Theft Act of 1992 with representatives of the IRS to develop an audit technique guide for the used motor vehicle industry and with representatives of the FTC in interpreting the FTC Used Car Rule and publication of a dealer's guide to the rule come to mind. In each circumstance, work by dedicated people with differing points of view yielded an effective result.

Mr. Chairman, I thank you for the opportunity to participate here today and will answer any questions later as time permits. Thank you.

[The prepared statement of Mr. Whann follows:]

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of Counsel

HAND DELIVERED

March 2, 2009

Congress of the United States
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Re: Testimony before the Subcommittee on Commerce, Trade and Consumer Protection
of the House Committee on Energy and Commerce
"Consumer Protection in the Used and Subprime Car Market"

Dear Committee Members:

INTRODUCTION

Mr. Chairman, members of the Subcommittee, my name is Keith Whann and it is my pleasure to offer testimony on behalf of myself and in my capacity as General Counsel for the National Independent Automobile Dealers Association (NIADA) regarding "Consumer Protection in the Used and Subprime Car Market."

My career in the motor vehicle industry has spanned the last 25 years, while NIADA has represented independent (non-franchised) motor vehicle dealers for over 60 years. The NIADA and its State Affiliate Associations represent more than 20,000 independent motor vehicle dealers located across the United States. Most of these dealers own and operate small businesses as defined by the Small Business Administration. NIADA and its members recognize the need for the accurate exchange of information about used motor vehicles to promote better understanding of a transaction for consumers and also to protect dealers, not only in acquiring used vehicles for inventory, but also in selling those vehicles to the public. There is also an urgent need for additional capital being made available to dealers for financing the acquisition of inventory (floor planning) and for the extension of credit to customers wanting to buy a vehicle. This includes the tax treatment of a transaction where the dealer itself finances a customer's purchase. The testimony offered today is intended to provide you with an overview of some of the legal and regulatory challenges faced by the independent (non-franchised) used motor vehicle dealer.

OVERVIEW OF THE USED MOTOR VEHICLE BUSINESS

The motor vehicle industry is one of the most heavily regulated and complicated industries in America today. A host of state and federal laws impact every motor vehicle transaction, including State Unfair and Deceptive Acts and Practices (UDAP) Statutes, State Titling and Retail Installment Sales Acts, the Uniform Commercial Code, the Magnuson Moss Warranty Act, the Fair Credit Reporting Act, the Truth in Lending and Leasing Acts, the FTC Used Car Rule and Federal Privacy Laws and implementing Regulations, to name a few. See Attachment A. Additionally, not only have these State and Federal Laws gone through major revisions in recent years, but numerous case decisions and regulatory interpretations addressing compliance with these Laws are rendered on an ongoing basis, e.g. current FTC solicitation and consideration of comments on proposed revisions to the Used Car Rule and pending Department of Justice action to complete implementation of NMVTIS.

Putting all of this together, achieving document compliance for a motor vehicle dealership and keeping current with legal, regulatory and legislative developments that impact the dealership's documents and processes can be extremely challenging. The large number of overlapping state and federal laws and regulatory requirements makes compliance extremely challenging for the typical motor vehicle dealership and is confusing for consumers. Contrary to much of modern commerce that is now conducted with the swipe of a card to transfer electronic information, motor vehicle dealers are still confronted with mandatory requirements of ink on paper and retention of hard copies of up to twenty (20) documents required to memorialize a transaction. See Attachment B.

Today we live in a rapidly changing and seemingly more difficult world. It used to be that when a motor vehicle dealership made a mistake, it had an opportunity to fix it. Now, the first mistake a dealer makes can cause financial ruin. Not surprisingly, paperwork compliance is one of the biggest challenges and the area that presents the greatest legal exposure for a motor vehicle dealership and is a great source of confusion for the customer.

Remember, each document in a transaction is not meant to stand alone, but rather is an integral part of the entire transaction. Moreover, what is disclosed on one document can have significant impact on another. Thus, complying with the large number of overlapping disclosure requirements and maintaining consistency throughout their documents becomes paramount. In addition, State UDAP Statutes typically require that every retail sale of a motor vehicle be preceded by a written contract that contains all of the agreements of the parties, including all material statements made prior to obtaining the customer's signature on the contract. If a dealership is to be in compliance with all of these State and Federal Laws, the dealership must ensure that the Retail Buyers Order, FTC Buyers Guide and, if used, any Limited Warranty Document contain the required disclosures and those disclosures must be consistent and properly integrated into the appropriate documents.

Given the scope of this hearing, I could comment on literally dozens and dozens of topics affecting consumer protection and the used motor vehicle industry. However, I have limited my presentation to a few of the most compelling issues facing dealers today: warranties, the FTC Used Car Rule, financing, and tax treatment of anticipated revenue.

WARRANTIES

While there are many legal aspects to a traditional motor vehicle sale, one area that continues to pose significant legal compliance problems for dealerships and confusion for dealers and customers is warranties. While the concepts in this area are relatively straightforward, the issue becomes complicated because of the various federal and state regulations that often have an overlapping effect. See Attachments A and B. Because dealers are required to warrant their compliance with all applicable laws in lender/dealer agreements, including subprime lender agreements, and often are requested to warrant that the vehicle, which is the subject of the transaction, is in good condition, this area of the law merits significant attention in order to ensure compliance.

A warranty is a promise by a manufacturer or seller to stand behind its product. There are two types of warranties that businesses give consumers with the sale of a product, implied warranties and express warranties. Implied warranties are a creation of state law and are based upon the common law principle of "fair value for money spent." There are two types of implied warranties for consumer goods such as motor vehicles, merchantability and fitness for a particular purpose. An implied warranty of merchantability is a dealership's standard obligation when it sells a product and, unless properly disclaimed in states permitting disclaimers, it is made automatically with every product sold. In essence, this implied warranty is a promise that the product is in proper condition for sale, that it will function as intended and that there is nothing significantly wrong with the product. An implied warranty of fitness for a particular purpose arises when a consumer relies on the dealership's advice that a product can be used for a particular purpose. Implied warranties do not cover problems caused by abuse, misuse, wear or other factors not relating to the product's condition at the time of sale.

Many states, but not all, allow motor vehicle dealerships to limit or disclaim implied warranties. State laws also vary with respect to which implied warranties can be disclaimed and the manner of such disclaimer.

Generally, disclaiming implied warranties is accomplished by including a statement on the motor vehicle sales contract stating the dealer's intention to disclaim the implied warranties and sell the vehicle "as is," "with all faults," or by using other language that, in common understanding, calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Some state statutes provide that there is no implied warranty for defects that ought to have been discovered by a consumer if, before entering into the contract, the consumer has examined the vehicle as fully as desired or has refused to examine the vehicle and an examination would have revealed the defects.

In states that do not allow dealerships to disclaim all implied warranties, dealerships may still be able to disclaim one or the other. To exclude or modify the implied warranty of merchantability, the disclaimer language must mention the word "merchantability" and, if in writing, must be clear and conspicuous. To exclude or modify an implied warranty of fitness for a particular purpose, the disclaimer must be in writing and conspicuous. In any event, the disclaimer should be contained on the front side of the sales contract. If it must appear on the reverse side of the sales contract, language on the front side of the contract should be included informing the consumer that the warranty disclaimer does appear on the reverse side.

Unlike implied warranties that are automatically provided to the consumer unless disclaimed, an express warranty is an affirmative fact or promise made by the dealership's representative orally

or in writing that relates to the goods and becomes part of the basis of the bargain. Both state and federal law govern express warranties. Again, dealerships must refer to their state statutes to determine how express warranties are created and disclaimed in their jurisdiction. If, however, a dealership offers a written warranty, it must also comply with the federal Magnuson Moss Warranty Act.

The general goal of the Magnuson Moss Warranty Act is to ensure that consumers get complete information about warranty terms for products they purchase. The Act covers virtually any "consumer product" and only applies to written warranties. The term "written warranty" means any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking. The written affirmation, promise or undertaking must become part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product. Only the supplier actually making a written warranty is liable under the Act. A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person is not liable for failure of the written warranty to comply with the Act unless the supplier is deemed to have adopted the warranty.

The Act provides that, if a written warranty is offered, only necessary information should be included in a warranty document. Any extraneous material in a warranty may confuse consumers about the purpose of the document and about what it really covers. It also requires some very detailed information to be included in any written warranty, which must be disclosed clearly and conspicuously in a single document, in simple and readily understood language.

Two types of written warranties, full and limited, are defined in the Act. All warranties have to be prominently labeled as one type or the other. Indicating "full" on a warranty means a defective product will be repaired or replaced for free, including removal and reinstallation when necessary, and that the warranty extends to anyone who owns the product during the warranty period. If a full written warranty is provided, implied warranties cannot be disclaimed or limited to the duration of the warranty. Placing "limited" on a warranty means the warranty gives the consumer less than full warranty protection. By giving a limited warranty, the dealership is representing to consumers that there are some costs or responsibilities that are not undertaken by the dealership. Implied warranties can be limited in duration to the term of an express limited warranty.

If the foregoing is not enough of a problem, confusion for dealers and consumers often arises concerning the difference between a written warranty and a service contract. The term "service contract" means a contract in writing to perform over a fixed period of time, or for a specified duration, services relating to the maintenance or repair or both of a consumer product. It is sold to the consumer as an additional after-market product. A written warranty, as previously stated, must be part of the "basis-of-the-bargain." This means that it must be conveyed at the time of the sale of the consumer product and the consumer does not give any consideration beyond the purchase price of the consumer product in order to benefit from the agreement. It should be noted that an agreement that would meet the definitions of a written warranty as set forth under Federal Warranty Law, but for its failure to satisfy the basis-of-the-bargain test, is a service contract.

USED CAR RULE

Even if the rocky shoals of warranty law are successfully negotiated, dealerships must also comply with the Federal Trade Commission's (FTC or Commission) Used Car Rule. The FTC enacted the Used Motor Vehicle Trade Regulation Rule, more commonly referred to by the motor vehicle industry as the "Used Car Rule", in 1985.¹ The Used Car Rule requires used motor vehicle dealers to disclose information about warranty coverage, if any, on used motor vehicles they offer for sale. To convey such information to consumers, dealers are to display a Buyers Guide (Guide) that, among other things, discloses information about warranty coverage on each used vehicle offered for sale. A vehicle is considered used under the Rule if it has been driven more miles than are necessary to deliver it to an ultimate purchaser.² The Buyer's Guide must be prominently and conspicuously displayed on or in the used vehicle so that both sides are readable. The layout for the Buyer's Guide is set forth in the Rule. The dealership must use the wording, type style, type sizes and the format specified in the Rule. Furthermore, the Guides must be printed in one hundred percent black ink on white paper cut to at least eleven inches by seven and one-quarter inches. Colored ink may be used to fill in the blanks on the Guide.

Dealerships must give the buyer of the used vehicle a copy of that vehicle's Buyer's Guide at the time of sale. A signature line may be included on the Guide and the buyer may be asked to sign to acknowledge that he or she has received the Guide. If a signature line is included on the Buyer's Guide, a disclosure must also be included near the signature line that says, "I hereby acknowledge receipt of the Buyer's Guide at the closing of this sale." Additionally, the signature line must appear in the space provided for the name of the individual to be contacted in the event of complaints after the sale.

As part of its regular review of regulations and guidelines, the FTC has invited comment on whether the Rule should be revised to permit use of a single, bilingual Buyer's Guide and the possible design of a bilingual Guide. The Commission has also requested comment on the efficacy of retaining the current pre-printed list of major systems and defects that must be disclosed on the Guide. Finally, comment has been requested on the utility of developing alternative Buyer's Guides to assist in disclosing a dealer's own warranty, unexpired manufacturer warranties, manufacturer's used car warranties, and used car warranties provided by third parties other than the manufacturer. NIADA is committed to assisting the FTC in developing cost-efficient and common sense modifications to the Rule to accommodate both consumers and dealers and has submitted comments to the FTC regarding the proposed changes.

There is a continuing need for this Rule that has been in place for almost twenty-five years. In that time, dealers have developed procedures for compliance with the Rule and have used it to communicate information to customers. Further, the Guide has become part of the car shopping/selling process. It is a mechanism that dealers use to impart information to customers

¹ 49 Fed. Reg. 45,692 (November 19, 1984).

² This creates the possible anomaly that a vehicle that is still on a manufacturer's certificate of origin, but has been placed in demonstrator service, must, under state and federal law, be listed on a purchase contract as a "new," "used," "demonstrator."

and that customers have become accustomed to receiving. As the Commission knows, one of the main uses of the Guide is to advise potential customers of the availability of warranty coverage, what is covered by the warranty and the duration of any warranty on a used vehicle. We believe that the availability of such information is valuable for customers and often assists in completing transactions because potential purchasers have more information about the vehicle being considered. The purposes of the Rule are being achieved every day in thousands of transactions. To abandon or fundamentally alter the Rule or the Guides would lead to less accurate disclosures and increase confusion among dealers and consumers.

By providing consumers information on the Guide concerning a vehicle's warranty or the fact the vehicle is being sold "AS-IS," the Rule enables consumers to obtain standardized, understandable information that can be used to compare vehicles and to assist in making a decision whether to purchase a vehicle.

There is support for minor modifications to the Buyer's Guide to reflect current market practices and allow used motor vehicle dealers to more fully and accurately disclose the panoply of warranties available in today's used motor vehicle market. The examples of modified Buyer's Guides, attached to the FTC's rulemaking Notice as Appendices A and B, propose an improved disclosure method and, with certain limited revisions, NIADA supports their adoption.

Part of the impetus for change is the development of warranty programs that did not exist when the Rule was adopted, e.g. dealers now offer a variety of "Certified Pre-Owned" programs to their customers. These programs offer a range of warranty protections from a variety of sources outside the dealer. Most motor vehicle manufacturers now offer certified programs on used vehicles of that manufacturers' make and that are sold by that manufacturer's franchised dealers. Beginning in the early 1990's, after the enactment of the Rule, these programs and the sale of certified used motor vehicles has grown dramatically. The proposed revisions to the Buyer's Guide address deficiencies in the current documents.

Subsequent to the Rule's enactment, there has been an explosion of Internet advertising across the full spectrum of commerce. This applies to all dealers. Virtually every one has a computer and the ability to develop, at a minimum, a limited website for the purpose of advertising inventory or may use a third party website. NIADA believes it would be advantageous to dealers and consumers for the dealer to be able to post **examples** of its Buyer's Guides along with its Internet advertising, e.g. to highlight "AS-IS," dealer warranty, or certified programs. Having an example of what a Guide would look like for each category (not for each vehicle in inventory) would enable dealers to get valuable information to potential customers in preparation for a visit to the dealership. NIADA believes providing an example Guide in this fashion is similar to the Magnuson-Moss Warranty Act³ pre-sale availability requirement where dealers must have a representative example of a warranty document available for customers to review prior to entering into a transaction to acquire a motor vehicle.

State Unfair and Deceptive Acts and Practices statutes often incorporate by reference Federal laws, thus leading to confusion about how warranties are explained. Conflict may arise, for example, where states may limit implied warranties or require that a dealer offer a minimum express limited warranty. Additionally, a dealer may offer an implied warranty only on certain

³ 15 U.S.C. §§ 2301-2312.

systems for a limited length of time. The Buyer's Guide is currently not capable of accommodating all of these variables.

I am aware of some consumer advocates' dissatisfaction with the current state of the Used Car Buyer's Guide and now seek a radical makeover of the document. Essentially, these advocates desire to make the document a catchall for all types of information that was never intended to be in the Guide.

For example, it has been suggested that a revised Guide include lemon law notices and buyback information, vehicle history and title brand data, and odometer readings. Such broad expansion of the Guide is unwarranted and will lead to substantially increased costs for motor vehicle dealers. It will also place them in an untenable situation regarding enforcement because all of the information suggested for inclusion is not necessarily available to dealers on a real time basis.

Further, any suggestion that such information is readily available through vehicle history sources and through title records is disingenuous as such statements do not address the limitations on vehicle history services, including proposals such as NMVTIS (National Motor Vehicle Title Information System), and the lag time of title information.

Through NIADA, we have urged the FTC to remember that the Buyer's Guide is a warranty disclosure document, not a "tell me everything you know and don't know about a vehicle" document. The Guide is to advise if a warranty is available or not, who provides any warranty and the duration of such warranty, what is covered by any warranty and the identity of someone at a selling dealership to whom a customer may inquire or complain about warranty problems. The logic of this limitation is best understood against the backdrop of the vast array of state and federal consumer protection legislation that addresses virtually all of the other types of information that is now suggested as being "necessary" for inclusion on the Guide.

States deal with lemon law and buyback notices and there are federal and state odometer disclosure laws. All of this legislation requires information to be disclosed prior to the conclusion of a sale or lease of a new or used motor vehicle. To now require such information to be disclosed in another document and to go through the cost of reprogramming the Guide to accommodate all the required new information is a cost that is unnecessary and should not be imposed on dealers, as it will only be passed on to consumers in the cost of the vehicle.

It has been suggested that the FTC follow the model created by Wisconsin. That is a slope far too slippery to travel. Wisconsin's document resulted from a request to the FTC to permit an "exception" based on a unique set of state laws. To suggest that now be the model for the remainder of the country is an unwarranted intrusion on virtually every other states' decisions on how best to protect its citizens and, once again, creates an inordinate cost to dealers that would, ultimately, be passed on to consumers in the document of higher prices for vehicles.

The Commission has been urged to leave the Used Car Rule essentially as it is and not morph this long-standing effort into something it was never intended to be.

Generally, states deal very effectively with disclosure of information that might be revealed through a vehicle history report. If a dealer misrepresents the history or condition of a new or used vehicle, then a state's UDAP statute provides meaningful remedies to customers, both

through individual and class actions and permitting recovery of treble damages and attorney fees.

As to vehicle history reports, I urge Congress and the FTC to exercise caution in considering this type of information. First, there should be no real debate that history reports of any type are only as good as the information contained in them. If the vehicle history provider has not acquired existing information or has acquired it but not yet placed it in its database, then a report obtained one day may appear to be "false" when reviewed the next day or the next hour after the information is uploaded into the provider's system. This shortcoming exposes dealers to real harm when subjected to litigation due to the absence of information from a report. There is no "safe harbor" for a dealer who acquires such a report and provides it to a consumer.

The same is true for NMVTIS. The system went live on January 30, 2009. However, it remains incomplete and, thus, totally ineffective. Much of the responsibility for collection and reporting of data remains with the states. Currently, only thirty-seven (37) states are involved, even on a limited basis, with NMVTIS. Only thirteen (13) states participate fully, fourteen (14) provide data on a more limited basis and only an additional ten (10) are taking steps to provide date or participate more fully. As long as even one state remains out of the system or is unwilling to require or to acquire and report data in a timely fashion, NMVTIS cannot be effective.

While the goal of NMVTIS is a worthy one, it requires cooperation of many entities, both state and federal. Even if all states someday participate fully, some data gaps will remain, i.e. private sales (estimated at 40% of all used motor vehicle sales annually), rental car sales and sales by other fleet operators that privately insure their vehicles. The number of vehicles involved is so significant that a dealer will not be able to guarantee to a customer that a particular vehicle has not been rebuilt or involved in a flood. Until all of the information gaps are plugged, there is no "safe harbor" for a dealer who acquires a vehicle history report and supplies it to a consumer.

FINANCING

NIADA has also been involved in reviewing and critiquing proposed regulations concerning "Risk-Based Pricing". NIADA commended the FTC and Federal Reserve Board for their genuine effort to create a workable regulatory scheme within the confines of an exceedingly challenging statutory mandate. However, as discussed below, NIADA believes the agencies have created a regulatory scheme that impermissibly and imprudently applies the risk-based pricing notice requirements contained in Section 311⁴ on persons, such as automobile and truck dealers involved in three-party financing, who do not engage in risk-based pricing.

If the agencies retain in the final rule a regulatory scheme that imposes the risk-based pricing requirements on dealers who do not engage in risk-based pricing, the agencies should retain the exception notices set forth in the proposed rule subject to the modifications and clarifications set forth below. The agencies also should retain, subject to the same modifications and clarifications, the exception notices for dealers involved in two-party financing transactions who do engage in risk-based pricing.

⁴ Section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)(73 Fed. Reg. 28,966-29,021 (May 19, 2008); 73 Fed. Reg. 30,814-30,818 (May 29, 2008).

As a threshold matter, it is important to understand the respective functions typically performed by dealers and finance sources in two party and three-party vehicle financing transactions.

Most consumers who take delivery of a vehicle from a franchised automobile dealer will finance the purchase of the vehicle or enter into a lease agreement with the dealer. When the consumer makes arrangements to obtain financing for the purchase directly from a finance source (such as a bank, finance company, or credit union), the transaction is commonly referred to as "two-party financing" as the finance contract involves two parties -- the consumer and the finance source. Similarly, when the consumer obtains financing from a dealer that serves as its own finance source (often referred to as "buy-here, pay-here financing"), the transaction also is referred to as two-party financing as the finance contract in this instance also involves only two-parties -- the consumer and the dealer.⁵

Most finance transactions involving dealers include three parties -- the consumer, the dealer, and the assignee-finance source that may include subprime lenders -- and thus are commonly referred to as "three-party financing." In typical three-party financing transactions, the consumer enters into a finance contract with the dealer that is conditioned on a finance source's willingness to take assignment of the finance contract from the dealer. If the dealer cannot secure such an agreement from a finance source, then the finance contract is not consummated. This arrangement is necessary, as most dealers are not equipped to serve as their own finance source.

The typical three-party financing transaction begins with the consumer providing the dealer with a completed credit application that authorizes the dealer to (i) obtain a copy of the consumer's credit report, and (ii) submit the consumer's credit application to finance sources (with which the dealer has a contractual relationship) to determine which of them may be willing to take assignment of a credit contract between the dealer and the consumer. The dealer obtains the credit report to determine which of its finance sources to send the credit application based on the finance source's lending guidelines.⁶

The finance sources that receive the credit application then perform underwriting to determine the credit risk presented by the credit applicant. As part of this process, the finance sources typically obtain their own credit report, which may be from a credit-reporting agency different from the credit reporting agency used by the dealer. The finance sources' underwriting analyzes risk-based factors, such as loan-to-value and debt-to-income ratios, verification of employment, and routine entries on the applicant's credit report (e.g., credit score, number of delinquent accounts, bankruptcy filings, etc.). If a finance source agrees to buy a finance contract from the dealer, it will offer the dealer a wholesale buy rate that reflects the credit risk presented by the applicant.⁷

⁵ Albeit uncommon, another variety of two-party financing occurs when a dealer arranges financing directly between the consumer and the finance source. When this occurs, the finance source (and not the dealer) acts as the initial creditor.

⁶ Although not typical, some franchised dealers do not obtain a credit report and some only have a contractual relationship with a single finance source.

⁷ Other factors unrelated to risk also contribute to the buy rate such as the cost at which the finance source acquired the funds, the finance source's underwriting costs, and its profit.

The dealer does not repeat the costly underwriting process engaged in by the finance source, but rather negotiates with the consumer to determine the amount of its retail margin on the financing it provides (similar to the manner that it negotiates the amount of the retail margin on the vehicle it provides). The dealer thus does not establish its retail margin (which, in the vehicle financing context, is commonly referred to as "dealer participation" or "dealer reserve") according to a proprietary or other system or methodology to assess the risk of nonpayment by the consumer. On the contrary, the dealer determines its dealer participation based on factors such as the extent to which it can offer a competitive rate, its desire to sell a particular vehicle, its efforts to develop and maintain customer loyalty (each of which can result in no dealer participation at all), etc. Thus, whereas the finance source sets a buy rate that, in part, reflects the risk of non-payment by the consumer, the dealer sets dealer participation based on a variety of non-risk factors.⁸

TAX ISSUES

The last issue I want to discuss involves a plan to aid in reversing the motor vehicle industry's downward fiscal spiral. The President and this Subcommittee are searching for the right ingredients for an economic stimulus package to strengthen the economy. Although there has been a great deal of discussion about spending billions of dollars to accomplish this task, there is a viable partial solution that would cost taxpayers virtually nothing by being "revenue neutral," i.e. restoring the cash method of accounting for installment sales of used motor vehicles.

The motor vehicle industry has a significant impact on our economy. It impacts millions of jobs in America and even those Americans who do not work in the motor vehicle industry use a motor vehicle on a daily basis, most of them to get to work.

Congress has considered numerous programs to help the economically disadvantaged, but in all of these programs a single question remains unanswered: How do they get to work? Whenever individuals lose their jobs, regardless of whether it is due to corporate downsizing, health problems, or another reason beyond their control, it is typical for their credit to become impaired. The number of Americans with impaired credit that cannot obtain conventional financing is steadily growing. This fact, combined with the trend of various subprime lenders exiting the financing market for purchases of used vehicles, makes the situation even more disconcerting. It is becoming extremely difficult for individuals with impaired credit to find and obtain affordable transportation.

One of the few places credit impaired consumers have to turn is a motor vehicle dealership that is willing to finance the consumer's purchase itself. What is the dealership's reward for helping consumers get much needed transportation and providing financing when no one else will? They are obligated to pay tax in advance on anticipated revenue that has not been received and, in many cases, will never be received. Rather than being faced with such a huge disincentive, motor vehicle dealerships should be provided with an incentive to help individuals finance these transactions.

⁸ To be sure, in many dealer agreements with their finance sources, dealers are exposed to the risk of loss in the early stages of an assigned credit contract. However, dealers do not set or adjust dealer participation based on the risk of nonpayment by the consumer. As discussed above, this risk already is accounted for in the buy rate that is set by the finance source after the application of its underwriting process.

Allowing motor vehicle dealers to use the cash method of accounting or something similar would not only help provide a boost for our weak economy by aiding motor vehicle dealers, it would also give more economically disadvantaged individuals access to much needed transportation.

In the not too distant past, the Internal Revenue Service (IRS) released Revenue Procedure 2000-22, which allowed certain taxpayers with gross receipts of \$1 million or less to use the cash method of accounting. In December of 2001, the IRS released a Notice of a Proposed Revenue Procedure, Notice 2001-76, in which it has proposed to exercise its discretion to allow certain business taxpayers with gross receipts of \$10 million or less to use the cash method of accounting. Unfortunately, the IRS specifically excluded retail sellers that engage in installment sales, including motor vehicle dealers, from availing themselves of the benefits of the cash method of accounting. It is unclear why motor vehicle dealers are prohibited from utilizing this accounting method, when the IRS is making it available to other small businesses. At a minimum, a tax procedure equivalent to the cash method of accounting for installment sales of used motor vehicles that permits the taxing of income in the year it is earned should be restored to level the playing field.

In addition to the foregoing, there is another reason to permit the use of some form of an installment or cash method of accounting to spur the sale of used motor vehicles. By increasing the ability for dealers to sell vehicles at the lower end of the used vehicle price spectrum, dealerships will be able to create an outlet for the late model trade-ins. If we want to keep individuals employed manufacturing and selling new vehicles, we have to make sure they can sell the trade-in vehicles. If they are unable to do so, the number of new motor vehicles manufactured will decrease significantly causing a very negative ripple effect throughout the entire motor vehicle industry and on our nation's economy.⁹

Considering the overall positive impact that restoring the cash method of accounting for installment sales of used motor vehicles would have on the motor vehicle industry and our nation's economy, not to mention individual purchasers, the case for bringing it back is strong. More consumers would have access to affordable transportation and the means to finance the purchase of a used motor vehicle. Affordable transportation is a necessity, not a luxury, in today's world and ensuring everyone has access to transportation to get to and from work will certainly help improve the success rate of various federal programs.

⁹ Tax treatment of dealership revenue, the ability of dealers to finance their motor vehicle inventory and consumers' ability to finance their purchases are all critical elements of the motor vehicle industry. The system becomes disrupted in difficult times such as these due to the limited ability to obtain financing for inventory and for a used vehicle purchase. If, as NIADA believes, one of the goals of this hearing is to understand the relation of consumer protection and used motor vehicle financing, then it is imperative that the Sub-Committee understand the negative effect on motor vehicle sales caused by the lack of financing at both the wholesale and retail levels. If a dealer cannot obtain satisfactory floor plan financing, then it cannot stock the type of inventory that is appealing to customers. For example, if a dealer cannot obtain financing for its inventory, it will stock fewer vehicles and consumers will be left with more limited choices of vehicles to purchase. Additionally, if the customer cannot obtain financing for the purchase of a 7-10 year old vehicle, then there will be attrition in the market of what vehicles are available and who can purchase them, leaving many people with no viable transportation option to get to and from work. Making the foregoing types of transactions a possibility leads to the possible sale of later model vehicles also. Instead of backing up on dealer lots because the older vehicles are not selling, later models now become available because customers' trade-ins are worth more, permitting them to invest more equity toward the purchase of a more recent model year or new vehicle.

Due to our current financial crisis, most, if not all, Americans are having to make major adjustments in their daily lives. Many people believe that our Country will never be the same. Change can be a positive thing, however, if our Country grows stronger and becomes more unified in the process. Virtually everyone agrees- heads of industry, consumer groups, economists, Republicans and Democrats alike -that our economy needs to be rejuvenated. To date, the focus of the debate has been on how much money to spend and how to spend it. Recognizing that it is always important to spend taxpayers' dollars wisely, solutions that do not require large expenditures of tax dollars should be considered first. As a result, some version of the cash method of accounting for installment sales of used motor vehicles should be restored immediately.

Sincerely,

Is/ Keith E. Whann

Keith E. Whann, Esq.
Outside General Counsel for the
National Independent Automobile Dealers Association

Attachments: A (Laws Impacting Used Car Sales and financing Paperwork and Practices)
B (Documents Typically Found in a Used Motor Vehicle Transaction)

Attachment "A"**LAWS IMPACTING USED CAR SALES AND FINANCING PAPERWORK AND PRACTICES****FEDERAL LAW**

- FTC USED CAR RULE
- TRUTH-IN LENDING & LEASING ACTS/FEDERAL REGULATIONS Z & M
- MAGNUSON MOSS WARRANTY ACT
- FAIR DEBT COLLECTION PRACTICES ACT
- FAIR CREDIT REPORTING ACT (RED FLAGS, ADVERSE ACTION NOTICES, ETC)
- FEDERAL PRIVACY LAWS
- NHTSA ODOMETER REGULATIONS
- FTC PROHIBITION AGAINST UNFAIR AND DECEPTIVE TRADE PRACTICES
- FTC WRITTEN WARRANTY RULE
- NHTSA RECALL REGULATIONS
- IRS CASH-REPORTING RULE
- USA PATRIOT ACT
- FEDEAL BANKRUPTCY LAW
- MONRONEY STICKER LAW

STATE LAW

- STATE UDAP STATUTES
- STATE MOTOR VEHICLE CODES
- STATE RETAIL INSTALLMENT SALES ACTS
- STATE CERTIFICATE OF TITLE ACTS
- STATE CREDIT SERVICES ACTS
- STATE DEALER LICENSING LAWS
- STATE ADMINISTRATIVE RULES
- STATE ODOMETER ACTS
- STATE INSURANCE LAW
- UNIFORM COMMERCIAL CODE ARTICLE 2 (SALES) AND 9 (SECURITY INTERESTS)

GENERAL LAW

- NEGLIGENCE LAW
- CONTRACT LAW

Attachment "B"

DOCUMENTS TYPICALLY FOUND IN A USED MOTOR VEHICLE TRANSACTION

1. Customer Proposal (may use a Worksheet or Customer Profile)
2. Trade-In Vehicle Appraisal
3. Test Drive Agreement (may use a Loaner, Demonstration or Borrowed Vehicle Agreement)
4. Privacy Notice
5. FTC Used Car Buyers Guide
6. Retail Purchase Agreement (also referred to as Retail Buyers Order or Bill of Sale)
7. Used Vehicle Limited Warranty (may believe a completed FTC Buyers Guide is all they need)
8. Spot Delivery Agreement (may call it a Conditional Delivery or Bailment Agreement)
9. Authorization to Release Payoff Information
10. F & I Product Purchase Confirmation (may be using an F&I Menu or Product Waiver)
11. Insurance Coverage Acknowledgement (Verification of Insurance)
12. Cash & Deposit Receipts
13. Credit Application
14. Retail Installment Sales Contract
15. Credit Insurance Disclosure
16. Delivery Confirmation (may use a We Owe or Due Bill)
17. State Mandated Titling and Registration Documents and Powers of Attorney
- 18.

AND IN SOME CASES

19. Customer Delivery Checklist (also referred to as a Customer Satisfaction Questionnaire)
20. Notice to Co-Signer
21. Arbitration Agreement
22. Goodwill Repair Acknowledgement (may call it a Policy Adjustment form)
23. Acknowledgement of As-Is Sale
24. Acknowledgement of Voluntary Resign
25. Other State Mandated Disclosures and Documents Related to F&I Products Sold

Mr. RUSH. Mr. Waldron, you are recognized for 5 minutes for opening statement.

TESTIMONY OF SCOTT WALDRON

Mr. WALDRON. Chairman Rush, Ranking Member Radanovich and members of the subcommittee, I appreciate the opportunity to testify before you today regarding the protection of consumers shopping for a used car. Today I will discuss how the timely disclosure of total-loss vehicles can help protect consumers as well as what Experian Automotive does to help inform consumers and businesses in the used car market.

Experian is an information services company that is a leader in consumer credit, marketing services and electronic commerce. Experian Automotive, based on Schaumburg, Illinois, works with consumers, manufacturers, dealers, auctions, finance and insurance companies and people throughout the automotive retail channel. Our national vehicle database housing records on more than 600 million vehicles along with Experian's credit consumer and business information assets meets the growing demands of our industry and consumers in providing valuable information in a timely and cost-effective manner. Experian Automotive is similar to other business units in that we analyze and compile third-party information to help consumers and organizations make good decisions.

One piece of information not usually available in a timely manner is when an insurer declares a vehicle loss. It can take up to 60 days to be registered in State titles. In that time the vehicle is likely to have already been sold to an auction, then to a dealer and then on to a consumer. This is information that both the dealer and the consumer would want to know before they bought the vehicle. To ensure that information on vehicles declared a total loss is disclosed in a timely manner, Experian believes that total-loss information should be made commercially available and has and does support legislation requiring the disclosure of vehicles declared a total loss.

Switching now to how Experian helps protect consumers and dealers in the used car market, I am going to discuss the Auto Check Vehicle History Report. Auto Check is designed to help consumers and businesses make better vehicle purchase decisions by quickly and easily understanding key vehicle events. Using the vehicle identification number, or VIN, an Auto Check Vehicle History Report reveals frequently and location of title and registrations, title brands, accidents, odometer history and a number of other things for consumers. The information comes from many data sources including State departments of motor vehicles, auto auctions, police accident reports, salvage yards and so on. Compiling information from many sources allows Auto Check users to view significant information about the vehicle in a single convenient format. Consumers, dealers, auctions and manufacturers access Auto Check information via the Auto Check and other partner Web sites and directly through asking dealers for a copy of the report. The extensive use of Auto Check in the wholesale market by automobile auctions and dealers enables the parties to more quickly decide on a fair price.

Now, while vehicle history reports are important, confusion often remains over the relative significance of various pieces of information presented in them. To help quantify and weigh various pieces of information, Experian Automotive developed a rating methodology based on statistically valid models. The result is the Auto Check score. This number compares a particular vehicle to others in its class and age range in order to help build confidence in a purchase decision. It leverages Experian's continuously updated vehicle database in combination with a company's expertise in data analysis to provide a single number score from 1 to 100 for comparison purposes, making it easy for a buyer to understand what information they are looking at. Attached to my prepared testimony are two examples of Auto Check Vehicle History Reports. The first one you would see shows a clean vehicle and the second shows a vehicle with title issues.

My last point is that there are numerous ways Experian Automotive works with public and private organizations to improve titling and brand disclosure. For example, Experian has been working with the National Insurance Crime Bureau to combat vehicle theft rings. We provide information to them at no charge to detect fraud in vehicle identification numbers including VIN cloning and counterfeiting. NICB has disseminated 290 leads since August of 2007 based on data provided by Experian. From these leads, over 100 vehicles have been recovered with a combined estimated value of about \$2 million.

In conclusion, the business model for Experian Automotive is to provide businesses and consumers with relevant information from a wide variety of sources in a timely manner. The information in the Auto Check Vehicle History report and importantly, the Auto Check Score, helps consumers know whether or not the car is a good deal for them. On a personal note, Experian is in business to be successful but nothing is more personally satisfying to me than the e-mails, phone calls and letters we get from consumers thanking us for helping them pick the best car for them or more importantly, helping them avoid a car with a troubled history.

Thank you, and I would be happy to take questions on any of this.

[The prepared statement of Mr. Waldron follows:]

Before the United States House of Representatives

**Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection**

Hearing on Consumer Protection in the Used and Subprime Car Market

Thursday, Wednesday, March 5, 2009 – 10:00 am
2123 Rayburn House Office Building

Testimony of Scott Waldron
President
Experian Automotive

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Introduction

Chairman Rush, Ranking Member Radanovich, and members of the subcommittee, I appreciate having the opportunity to testify before you today regarding consumer protection in the used car market. I would be glad to discuss how the timely disclosure of vehicles that are a total loss can help protect consumers as well as how Experian Automotive can benefit those consumers who are in the market for a used car. We at Experian Automotive continually work to develop and improve our products so that a prospective buyer of a vehicle can understand its history and make an informed decision about that purchase. Experian Automotive is similar to other business units in Experian in that we collect and compile third-party information that we then analyze and deliver in a meaningful manner to help consumers and businesses make timely decisions. A crucial element to better protecting consumers is the use of more information, not less. However, before I explain total loss disclosure and our products, please let me provide some background on our company.

Description of Experian Automotive

Experian is a global leader in providing information, analytical and marketing services to consumers and organizations to help manage the risk and reward of commercial and financial decisions. Combining its unique information tools and deep understanding of individuals, markets and economies, Experian partners with organizations around the world to establish and strengthen customer relationships and provide those businesses with competitive advantage.

For consumers, Experian delivers critical information that enables them to make financial and purchasing decisions with greater control and confidence. Customers

include consumers and client organizations from financial services, retail and catalog, telecommunications, utilities, media, insurance, automotive, leisure, e-commerce, manufacturing, property and government sectors.

Experian Automotive, a part of Experian, delivers information services to manufacturers, dealers, finance and insurance companies, and consumers. Its National Vehicle Database, housing records on more than 600 million vehicles, along with Experian's credit, consumer and business information assets, meets the growing demands of the industry and consumers in making this valuable information available and useful in a timely, cost-effective manner. Experian technology supports several top automotive Web sites. For more information on Experian Automotive and its suite of services, visit our Web site at www.experianautomotive.com.

Acquiring the VINs on Vehicles Declared a Total Loss in a Timely Manner

There is one piece of information that a potential buyer of a motor vehicle would want to know that currently is not usually available in a timely manner: the fact that the vehicle was declared a total loss. Under the current titling system, for a vehicle that is declared a total loss by an insurer, it may take up to 30 to 60 days for that fact to be registered in the title issued by a state. However, in that time, the vehicle is likely to have been repaired, sold at a car auction to an automobile dealer, and then sold to a consumer by that dealer; all of these transactions can occur before the information about the declaration is disclosed to the auction, dealer, or consumer. This is information that both the dealer and the consumer would certainly want to know *before* each bought the vehicle.

To ensure that information on which vehicles have been declared a total loss is disclosed in a timely manner, Experian believes that total loss disclosures should be made commercially available. Toward that end, Experian has supported legislation that would require the disclosure of total loss vehicles. If total loss information were made commercially available by means other than legislation, however, that would meet our purposes as well. The keys are that this information should be disclosed in a timely manner since a totaled car can move quickly and that this information should be made commercially available. The end result is that a purchaser would be able to find all of the relevant information on a vehicle in one place and when the purchaser is trying to make a decision. Making a prospective purchaser go to more than one source to find information on a vehicle does not recognize the speed with which transactions occur.

How Experian Automotive Helps Protect Consumers

Car title fraud is an age-old scourge. Fortunately, technology has enabled some solutions to better protect consumers. An increasing level of protection is achieved by active efforts to develop and continually improve products that give the purchaser of a motor vehicle relevant and timely information. One of Experian's key automotive solutions is its AutoCheck® Vehicle History Report. The Vehicle History Report is designed to help consumers and businesses make better vehicle purchase decisions by quickly and easily understanding potentially significant historical events for pre-owned vehicles manufactured in 1981 or later. Using the Vehicle Identification Number (VIN) and depending on the information reported to Experian, a Vehicle History Report can reveal frequency and location of title and registrations, past title brands, past accidents, and odometer history.

AutoCheck Vehicle History Reports supply information about pre-owned vehicles from a multitude of data sources, including state departments of motor vehicles (DMVs), auto auctions, police accident reports, and salvage yards. By compiling information from a variety of sources, the user of a Vehicle History Report can consider significant information about the vehicle in question that may be available. This information is all in a single convenient form, rather than making the potential buyer go to multiple sources.

AutoCheck is the volume leader in supplying vehicle history information to the automotive industry. Consumers, dealers, auctions, and manufacturers can easily access the AutoCheck information via the AutoCheck web site or other integration methods.

The extensive use of Vehicle History Reports in the wholesale market by automobile auctions and dealers enables the parties to understand the key events that are reported and to quickly decide on a mutually satisfactory price. For example, Experian Automotive has a partnership with the National Automobile Dealers Association to integrate and market AutoCheck vehicle history information to auto dealers through its line of used car valuation products. AutoCheck offers toll-free telephone and email support to all clients should they have questions regarding any event in the vehicle's past.

Yet, for the reliance on vehicle history reports in general, confusion remains over the relative significance of the various pieces of information presented in it. For example, the report for a particular vehicle may show that it was originally part of a rental fleet; what it doesn't explain is whether that is a good or bad thing, especially when compared to a vehicle with a similar make, model, and age that was not used as a rental. As a result, much of the data presented remains open to interpretation, sometimes complicating what should be a straightforward communication.

Consider that the typical vehicle history report presents numerous data points with little sense of weighting or importance. While it can be presumed that a vehicle's accident history outweighs factors such as the number of owners, it doesn't say by how much, or when that might actually be less important. Also, many of the factors that appear on the report may be more important to one individual than they are to another. In addition, older vehicles by nature will tend to have longer vehicle histories, which can be good or bad. The diversity of these factors makes it difficult to provide an even, consistent interpretation of the overall quality of the vehicle's reported history, and its chances of being on the road after a given period of years.

Recognizing these limitations, Experian Automotive sought to organize, quantify, and weight various data points to create a simple rating methodology based on statistically valid models (rather than individual interpretation). The goal was to create a scoring system much like a consumer credit score, or the gas mileage ratings for new vehicles. This number could be used to compare a particular vehicle to others in its class and age range in order to build confidence in a purchase decision.

The culmination of this effort is AutoCheck ScoreSM. It leverages Experian Automotive's massive, constantly updated database of vehicle history information in combination with the company's expertise in data analysis and interpretation to provide a single-number score for comparison purposes. This number accounts for factors that can affect a used vehicle, weights them according to the performance of millions of prior vehicles in Experian's database, and presents it in a manner that is easy for a buyer to understand.

For informational purposes, attached to my testimony are two samples of AutoCheck Vehicle History Reports. This first one would be for a hypothetical “clean” vehicle. The second sample report would be for a vehicle whose history finds problems with the title.

In addition to reviewing a Vehicle History Report, Experian recommends a thorough vehicle inspection be performed as well. We also advocate that consumers would do well to follow the inspection tips from the National Automobile Dealers Association.

Public/Private Efforts to Improve Titling and Disclosure of Brands

There are numerous examples and opportunities of how public and private organizations can partner to improve titling and brand disclosure.

For instance, Experian Automotive has collaborated for years with the National Insurance Crime Bureau (NICB) to combat automobile theft rings. We provide tools to them at no charge to detect fraud regarding Vehicle Identification Numbers (VINs) such as the use of an existing VIN for a stolen vehicle (cloning) or the creation of a new VIN altogether (counterfeiting).

In addition, Experian has enjoyed a good relationship with the American Association of Motor Vehicle Administrators (AAMVA) for many years. Experian supports AAMVA as an Associate Member and through our participation in the Industry Advisory Board. We have been in discussion with AAMVA for some time about how we may further support their efforts to combat title and vehicle fraud.

Experian offers our AutoCheck services free of charge to law enforcement agencies to support their investigative efforts. We support organizations such as the

National Odometer and Title Fraud Enforcement Association (NOTFEA), the International Association of Lemon Law Administrators (IALLA), and the Association of Traffic Safety Information Professionals (ATSIP).

For the past several years, industry has developed assets and solutions for the marketplace that can be leveraged to support title information as provided for under the Anti-Car Theft Act. For example,

- Experian currently receives vehicle data from all U.S. jurisdictions. A comprehensive, national data source is imperative in combating title and vehicle fraud.
- Experian has expended significant resources in analyzing, interpreting, validating, standardizing, and hosting these data to provide a comprehensive national database of vehicle data to be used in solutions and services. This process allows the data to be used in a 'common' format while retaining the specific content of the different sources.
- Experian has developed secure, flexible methods for distributing our vehicle history reports and services based on the needs of our partners and clients.

Experian welcomes the opportunity to work with government to provide critical information to consumers and business. Whether working with NICB, AAMVA, the state DMVs, or other organizations, having comprehensive vehicle history information available at the point of purchase or titling a vehicle, or during an investigation, is critical to consumers, businesses, DMVs, law enforcement, and others in combating title and vehicle fraud.

Conclusion

The business model for Experian Automotive is to develop products and services for businesses and consumers that provide relevant information from a variety of sources in a timely manner when a decision needs to be made. The result is that a consumer can turn to a reliable third party to learn about a used car that she is interested in buying. The information in the AutoCheck Vehicle History Report and the AutoCheck Score can help the consumer know whether or not the car is a good deal. When a person is making what may be the second largest purchase in their life, this information can remove much of the uncertainty.

Of course Experian is in business to be successful, but there is nothing as personally satisfying as the emails and letters we get from consumers thanking us for helping them pick the best car for them, or, more importantly, helping them avoid a car with a troubled history.

I would be glad to answer any questions.

Mr. RUSH. The chair thanks the gentleman. The chair recognizes himself now for 5 minutes for the purposes of questioning the witnesses. But before I proceed, I would like to request unanimous consent to enter into the record a statement by Public Citizen and the testimony of Mr. William Brauch, the director of the Consumer Protection Division in the Iowa Attorney General's Office. Hearing no objections, so ordered.

[The information follows:]



STATEMENT OF PUBLIC CITIZEN

"Consumer Protection in the Used and Subprime Auto Market,"

A Hearing Before the Subcommittee on Commerce, Trade and Consumer
Protection of the House Committee on Energy and Commerce

Thursday, March 5, 2009

Public Citizen would like to thank the Subcommittee for holding the hearing "Consumer Protection in the Used and Subprime Car Market."¹ We would like to draw particular attention to several issues before the subcommittee relevant to this hearing:

- Problems with implementation of the National Motor Vehicle Title Information System (NMVTIS)—an important database that will let consumers learn the history of used cars. Although the Justice Department has finally issued regulations and launched consumer access to the system, obstacles remain: Many states are not yet participating fully, insurers and salvage yards have yet to start reporting data, and additional funding and action by the FTC are needed.
- A February 20, 2009, press release circulated by Carfax, which falsely claims that "one in five fatal accidents involve cars that have missing airbags," highlights the need for implementation of NMVTIS.
- Investigation of the authority of the FTC to prohibit binding mandatory arbitration clauses, which require consumers to waive their right to a fair trial and instead submit disputes to corporate-run arbitration systems. The FTC should use its authority to prohibit such clauses in auto sales contracts, finance contracts, and leases.

I. Implementation of the National Motor Vehicle Title Information System.

In 1992, Congress passed the Anti-Car Theft Act, which required the federal government to establish NMVTIS, a vehicle-history database that would provide public access to critical information about the reliability and safety of used automobiles gathered from states, insurance companies, and junk and salvage yards.² The Act requires that the database allow consumers to instantly and reliably establish not only the validity of a vehicle's title, but also its mileage and theft or damage history, which

¹ This statement was prepared by Public Citizen's Auto Safety, Litigation, and Congress Watch divisions, by Lena Pons, Deepak Gupta, and Graham Steele, respectively.

² P.L. 102-519, §§ 202-04, 106 Stat. 3390-93.

would indicate whether a vehicle had been branded as a junk or salvage vehicle. Congress mandated that the database be set up by January 31, 1996.

A History of Delay. NHTSA, the agency originally charged with creating the database, immediately began to show signs of bureaucratic delay. Rather than take steps to begin implementation, NHTSA convened a task force of affected industries and recommended further legislation and an extension of the implementation deadline. Frustrated with NHTSA's inaction, Sen. Charles Schumer commissioned a GAO investigation into the delay. When the statutory deadline of January 31, 1996 came and went without implementation, Congress reacted promptly by passing additional legislation to "expedite implementation of the motor vehicle titling information system."³ The legislation made two amendments to the 1992 legislation: (1) it transferred responsibility for NMVTIS from the Secretary of Transportation to the Attorney General, and (2) it extended the deadline for implementation of the system from January 31, 1996 to December 31, 1997. In passing the legislation, Congress reiterated the importance of prompt "implementation of the much-needed national titling information system, which would prevent thieves from obtaining legitimate vehicle ownership documentation and deter other serious consumer fraud related to transfer of motor vehicle ownership."⁴ The accompanying report concluded that the

³ H.R. Rep. No. 104-618 (1996), at 2-3, *reprinted in* 1996 U.S.C.C.A.N. 1060, 1061-61. The legislation was known as the Anti-Car Theft Improvements Act of 1996, Pub. L. 104-152, § 2-3, 110 Stat. 1384.

⁴ *Id.* at 3, 1996 U.S.C.C.A.N. at 1062.

"costs imposed on society" by such auto theft and fraud "remain unacceptably high, due in part to the failure to implement [NMVTIS]."⁵

Unfortunately, the government's foot-dragging continued. In 1998, Missouri-based Carfax, a for-profit corporation that sells vehicle-history data and thus has "a commercial interest in stopping the program," met with then-Senator John Ashcroft of Missouri. Subsequently, Ashcroft wrote to the GAO to request that it determine the need for an analysis of the system's costs and benefits. Ashcroft, possibly at the behest of private industry opponents of NMVTIS, had characterized the system as a "Washington boondoggle."⁶ In response, the GAO issued a report in August 1999, concluding that a cost-benefit analysis of the system by DOJ was warranted.⁷ The DOJ-commissioned cost-benefit analysis was released in 2001, by which time Ashcroft had become Attorney General, and concluded that NMVTIS was actually a huge bargain: With an initial annual investment in the range of \$10 million, the fully implemented system could "achieve benefits in the range of \$4 billion to \$11.3 billion annually," including significant benefits to consumers of automobiles.⁸

Litigation by Consumer Groups Spurs Action. In 2008—faced with continued delays in implementing the system, renewed interest in the problem of title washing, and a large number of fraudulently resold flood-damaged vehicles that were exported to other states following Hurricane Katrina—Public Citizen, joined by Consumers for

⁵ *Id.*

⁶ Jeff Brady, "Holes in Monitoring System Let Lemons Get Resold," National Public Radio, (Jan. 31, 2006).

⁷ GAO, *Anti-Car Theft Act: Issues Concerning Additional Federal Funding Of Vehicle Title System*, (1999).

⁸ Logistics Management Institute, *National Motor Vehicle Title Information System Cost Benefit Analysis* (2001).

Auto Reliability and Safety and Consumer Action, sued the Attorney General for unreasonable delay in implementing NMVTIS. The suit was successful and resulted in a September 2008 court order requiring implementation of the system. In accordance with that order, DOJ launched consumer access and issued final regulations on January 30, 2009.⁹

Continuing Challenges. Full implementation of the system is still hindered by incomplete participation by the states. Only 13 states are fully participating, 14 states are not participating at all, and some states are providing data, but not making inquiries of the system.¹⁰ For the system to be effective, all the states must participate. Of particular concern is California, which accounts for a large share of the nation's vehicle population. California's DMV is reporting data to NMVTIS but is attempting to prevent consumers from accessing that data to protect the revenue it brings in from the sale of that data.¹¹ An additional concern is the current lack of participation by Tennessee, which accepted substantial federal grant money from the DOJ for its NMVTIS participation but has not been reporting data to the system since 2005.

Attorneys General from 42 U.S. jurisdictions submitted comments to the FTC regarding information to be provided to used car purchasers under its Used Car Rule. Focusing on the benefits of NMVTIS, these comments stated that "the [Used Car] Rule's value is limited by the fact that it does not provide notice about the most material information consumers need to consider . . . the vehicle's history and prior use,

⁹ 74 Fed. Reg. 5740 (Jan. 30, 2009).

¹⁰ NMVTIS Participation Map, *available at* www.nmvtis.gov

¹¹ Two states, New York and Pennsylvania, had adopted the same position but agreed to release the data just days before a court-ordered deadline of February 27, 2009.

including prior title status, damage history, and whether it was repurchased by the vehicle manufacturer pursuant to a state Lemon Law"—in other words, information that would be provided by NMVTIS.¹² Of the 42 signatories, 18 were Attorneys General from states that are partially or completely non-participants in the NMVTIS program.

To make NMVTIS a reality, as Congress intended in the Anti-Car Theft Act, and to make its benefits more easily available to consumers, we propose the following:

- The Subcommittee should conduct oversight of the level of NMVTIS participation by the states and DOJ's role in implementing the system. The states should be asked to report on their plans to achieve full participation by next year, as required by DOJ's regulations.
- Congress should make available additional funding for NMVTIS to help ensure that states achieve compliance with federal regulations.
- Congress should tie a small percentage of federal highway funding to full compliance with NMVTIS reporting requirements.
- As recommended by the state Attorneys General, the FTC should include in its Used Car Rule a requirement that information from NMVTIS be made available to consumers on the used car Buyers' Guide in a prominent and easy-to-understand format.

II. Recent Misleading Claims by a Private Distributor of Title Information Underscore the Need for Credible Information.

On February 20, 2009, Carfax circulated a press release claiming that "[a] new report from the National Highway Traffic Safety Administration (NHTSA) [found] that nearly one in five fatal accidents involve cars that have missing airbags."¹³ We investigated that claim and found that no such NHTSA report had been released, and

¹² See Comments of National Association of Attorneys General to Federal Trade Commission proposed rules (73 Fed. Reg. 42285 (Jul. 21, 2008)).

¹³ See Attachment 1: Carfax Press Release, "One in Five Fatal Car Accidents Involve Missing Airbags; Carfax Takes Action to Protect Public," (Feb. 20, 2009).

that Carfax had based its statement on an analysis published in the *Kansas City Star*, which looked only at frontal-impact crashes.¹⁴ The mistaken claim in the Carfax press release highlights (1) the legitimate concerns that used car purchasers have about their present inability to learn a vehicle's true history, and (2) the need for vehicle-history information to be gathered from all relevant parties (including states and insurance companies) and aggregated in a complete and credible database.

Consumers ought to have access to information about the prior history of used vehicles in order to make informed purchases and protect themselves from fraud. The usefulness of this information is predicated on its credibility and completeness. Congress asserted the need for public access to this information seventeen years ago, when it mandated the creation of the NMVTIS system. The concern felt by purchasers of used vehicles is real. Although Carfax misrepresented the results of the analysis published in the *Kansas City Star*, there is still a concern about missing or incorrectly replaced airbags, for which complete reporting of vehicle history is needed.

A second concern is the perception that Carfax reports obviate the need for the NMVTIS system. Carfax reports are based on an incomplete reporting of vehicle history, as the company does not have access to, for example, data from all insurers or accident reports from all jurisdictions. Carfax also lacks the authority to *require* information from insurance carriers, junk and salvage yards, and states—a unique advantage of the federally mandated system.

¹⁴ Mike Casey and Rick Montgomery, "Front airbags don't inflate in hundreds of head-on crashes." *Kansas City Star*. (Oct. 22, 2007).

III. The Federal Trade Commission Should Exercise Its Authority to Prohibit Binding Mandatory Arbitration, Which Poses a Major Obstacle to Consumer Protection in the Used Car Market.

Binding mandatory arbitration (BMA) clauses are routinely included in used automobile sales contracts, finance contracts, and leases. Buried in the fine print of these non-negotiable contracts, BMA clauses require consumers to waive their right to a fair trial in public court and instead submit disputes to an arbitration system run by firms that view large corporations as their clients. Car dealers use BMA to avoid accountability to consumers under the law and secure easy judgments against individuals. Consumers purchasing or leasing vehicles are a captive audience with no choice but to enter into the sales/lease contract put before them. BMA clauses are so prevalent in used car sales contracts that it is difficult for consumers to purchase a used automobile without being forced into arbitration.¹⁵

Automotive dealers have acknowledged that BMA is harmful and unjust. In 2002, Congress enacted the Motor Vehicle Franchise Arbitration Act¹⁶ to remove BMA clauses from “unfair auto dealer franchise agreements that are purposefully written in favor of the manufacturer.”¹⁷ California auto dealer William Shack testified before the Senate Judiciary Committee that the arbitration process was “fundamentally unfair” to dealers because arbitrators have economic ties to the manufacturer.¹⁸ Mr. Shack had been forced by a manufacturer into an arbitration process where he had “no state

¹⁵ See, e.g., Stephanie Mencimer, *Suckers Wanted: How Car Dealers and Other Businesses are Taking Away Your Right to Sue*, Mother Jones (Nov. 26, 2007).

¹⁶ See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028 (2002).

¹⁷ 146 Cong. Rec. H8688-01 (daily ed. Oct. 3, 2000) (statement of Rep. Bono).

¹⁸ See S. Rep. No. 107-266, at 6 (2002).

remedies, no right to a hearing, no right to an unbiased decision-maker, and no real right to appeal on this issue.”¹⁹ In the 110th Congress, Rep. Linda Sanchez introduced the Automobile Arbitration Fairness Act, which would have prohibited BMA in contracts between auto buyers and dealers.²⁰ In a 2000 letter to Rep. Jerrold Nadler, the National Automobile Dealers Association (NADA) stated that it “does not support or encourage the use of mandatory and binding arbitration in any contract of adhesion, whether a motor vehicle franchise contract between a manufacturer and dealer or a consumer contract” and “would not oppose other federal legislative efforts to preclude mandatory and binding arbitration as the sole dispute resolution mechanism in any contract of adhesion.”²¹

The FTC is aware of the problems for consumers created by consumer BMA in other contexts. The FTC’s recent report on the Fair Debt Collection Practices Act (FDCPA) states that there are serious problem with debt-collection arbitration.²² The Commission promised to look more closely at the practice and “may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other

¹⁹ *Id.* at 7.

²⁰ See H.R. 5312, 110th Cong. (2008).

²¹ See Letter from the National Automobile Dealers Association to Representative Nadler (Jul. 12, 2000). Despite their previous experiences with the horrors of BMA, some dealer groups opposed Rep. Sanchez’s bill. See Harry Stoffer, *Congress May Ban Mandated Arbitration*, AUTO. NEWS (March 10, 2008) at 4 (“The American International Automobile Dealers Association, which represents import-brand dealers, opposes the bill. AIADA President Cody Lusk said the bill would further burden ‘our already-overwhelmed legal system.’”).

²² FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 66 (Feb. 26, 2009) at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

laws the Commission enforces.”²³ The FTC should use its authority under Section 5 of the FTC Act²⁴ to prohibit BMA clauses in auto sales contracts, finance contracts, and leases. The FTC should also consider prohibiting BMA in all consumer contracts, as provided in the Consumer Fairness Act sponsored by Rep. Luis Gutierrez²⁵ and the Arbitration Fairness Act sponsored by Rep. Hank Johnson.²⁶

* * *

Public Citizen thanks the Subcommittee and its members for conducting this important hearing to investigate the concerns of used car purchasers, opportunities for improving the information available to used car buyers, and the variety of ways in which used and subprime auto consumers are at a disadvantage in making purchasing decisions.

²³ *Id.*

²⁴ 15 U.S.C. § 45(a).

²⁵ See H.R. 991, 111th Cong. (2009). The Consumer Fairness Act also declares the inclusion of BMA in consumer contracts an unfair and deceptive trade act or practice under federal or state law. *Id.*

²⁶ See H.R. 1020, 111th Cong. (2009). The Arbitration Fairness Act also prohibits BMA in non-union employment contracts and any disputes arising under a civil rights statute. *Id.*

Attachment 1: Carfax Press Release

Press Releases

**One in Five Fatal Car Accidents Involve Missing Air Bags;
Carfax Takes Action to Protect Public**

To: Assignment Desks

(Logo: <http://www.newscom.com/cgi-bin/prnh/20080507/CARFAXLOGO>)

Contact: Christopher Basso of Carfax, 703-934-2664

News Advisory:

A new report from the National Highway Traffic Safety Administration (NHTSA) finds that nearly one in five fatal accidents involve cars that have missing air bags. This problem endangers the lives of used car buyers, current owners and innocent passengers. To help protect the public from this potentially fatal fraud, air bag deployment information reported to Carfax is available for free at www.carfax.com/airbag.

Industry experts estimate that as many as 1 out of 25 previously deployed air bags are not properly replaced. Carfax urges drivers that have had their car's air bags replaced to make sure all air bags are functioning properly. In addition, anyone shopping for a used car should have an ASE-certified mechanic or body shop inspect the air bag system prior to purchase, along with a Carfax Vehicle History Report.

Carfax communications director Larry Gamache is available for interview to discuss the dangers of improperly repaired air bags and offer tips for avoiding the purchase of unsafe vehicles.

To schedule an interview, contact Christopher Basso of Carfax, 703-934-2664.

Photo: <http://www.newscom.com/cgi-bin/prnh/20080507/CARFAXLOGO>
<http://photoarchive.ap.org/>
photodesk@prnewswire.com

Source: Carfax

State of Iowa

Department of Justice

Consumer Protection Division

THOMAS J. MILLER
Attorney General

Hoover Building
Des Moines, Iowa 50319

**Before the U.S. House Committee on Energy and Commerce,
Subcommittee on Commerce, Trade and Consumer Protection**

**Written Testimony of William L. Brauch, Special Assistant Attorney General,
Administrator, Iowa Consumer Credit Code,
Director-Consumer Protection Division, Iowa Attorney General's Office**

March 5, 2009

I. Introduction

Thank you very much for this opportunity to address you regarding how best to protect used car buyers. Consumer fraud in the context of used car sales has been a substantial part of my work with the Iowa Attorney General's Consumer Protection Division, starting in 1987 as an Assistant Attorney General and, since March, 1995, as Division Director. During the past 22 years I have testified several times before congressional committees or subcommittees and authored comments to federal agencies, such as the recent Comment of the National Association of Attorneys General ("NAAG") to the Federal Trade Commission ("FTC") regarding the FTC's Used Car Rule,¹ and the recent comments of the Iowa Attorney General to the U.S. Department of Justice ("USDOJ") regarding the National Motor Vehicle Title Information System

¹ The NAAG Comment is attached as Appendix A. The Used Car Rule is formally known as the Trade Regulation Rule on the Sale of Used Motor Vehicles and is found at 16 C.F.R. § 455.

(“NMVTIS”)². I currently chair the NAAG Autos Working Group.

The majority of low income consumers cannot afford to buy their own homes. Therefore, the vehicles they buy will be the most expensive purchases they ever make. For most, their cars are a lifeline to work and school. Their limited incomes mean that they can ill afford to purchase unreliable vehicles or pay more than true market retail prices. Unfortunately, it is low income consumers, with fewer choices and more limited means, who are most often the victims of used car fraud. Most states have “Lemon Laws” to protect consumers against defective new or near new vehicles,³ but only a handful have similar protection for used car purchasers.⁴

Used cars with more mileage and use are more likely than other vehicles to have been in major wrecks or have incurred significant mechanical or structural problems. In addition, low income consumers have fewer choices in financing purchases of increasingly expensive used vehicles. Therefore, they are more likely to be prey for deceptive and unfair loan practices, such as payment packing, spot delivery, inflated trade-in values, or inflated income claims on credit applications. All of this adds up to making buying and financing a used vehicle a “minefield” for low income consumers. The bad practices cited above can be deterred by better laws and stronger enforcement. The federal government has a great opportunity to help in this effort.

II. Specific Recommendations

1. Require the Federal Trade Commission to Strengthen its Used Car Rule.

² The Iowa Attorney General’s Comment to USDOJ is attached as Appendix B.

³ An example is the Iowa Lemon Law, Iowa Code chapter 322G (2009).

⁴ It appears 6 states have enacted lemon laws for used cars that are somewhat like new car lemon laws, including Hawaii, Massachusetts, Minnesota, New Jersey, New York and Rhode Island.

The comments of NAAG to the FTC regarding the Used Car Rule recommend, among other things, that the FTC amend the Rule to require that the Buyer's Guide that must be posted on used vehicles include vehicle history information. The NAAG comments point out that vehicle history information has a much greater impact on the value and safety of a vehicle than any other information, including being vastly more material to consumers than the information the FTC currently requires be on the Buyer's Guide about warranty coverage and the types of components that can fail on used vehicles. NAAG's comment suggested that the FTC adopt on a national scale portions of the Buyer's Guide the FTC has approved for use in Wisconsin, where state law requires posting vehicle histories on used vehicles offered for sale by dealers.

Nothing diminishes a used vehicle's market value more than past damage. Consumers who know a vehicle has once incurred substantial damage discount its retail market value anywhere from 25% to 50% from average retail values. Many will decide simply to avoid purchasing such vehicles. Law enforcement officials encourage consumers to have all used vehicles with evidence of prior collision damage thoroughly inspected by collision repair specialists before deciding whether to purchase the vehicles or how much to offer for them.

Should the FTC decide not to amend its Used Car Rule to require dealers to disclose this information on the Buyer's Guide, *Congress should pass legislation requiring the FTC to do so.* The Buyer's Guide is a nationally-required document. It provides the most prominent location for a disclosure that a used car has been in a major wreck, been titled as salvage, flood or rebuilt, or had an odometer discrepancy. Obtaining and disclosing this information is becoming increasingly easier for dealers, particularly in light of the recent rule adopted by USDOJ relating to NMVTIS.

2. Require Federally-chartered Financial Institutions to Root out Bad Lending**Practices.**

Some of the abusive lending practices that have contributed much to the current mortgage meltdown originated in the auto financing world. These include dealers inflating the consumer's true income or inflating trade-in values to qualify the consumers for loans they cannot reasonably be expected to be able to repay. Despite the attention these practices have received in the context of home loans, they continue to this day in the auto lending arena. These practices have been facilitated by lenders who "looked the other way" or otherwise encouraged the practices resulting in failed loans, damaged credit, and repossessed vehicles. If the mortgage crisis has taught us anything, it should be that borrowers never benefit from an extension of credit that overstates or does not consider their ability to repay and that we all pay a price for such poor lending practices.

Congress should make it clear to the Office of the Comptroller of the Currency and to the Office of Thrift Supervision that their efforts to eliminate bad lending practices in the context of mortgage loans must be extended to other consumer loans, particularly auto loans. If the federal regulators do not act to deter these practices, Congress should step in and take responsible action to do so directly or via legislative directives to the applicable federal agencies. In doing so, Congress should be aware that most auto lending is provided via state-regulated lenders and, therefore, should insure that whatever limits it might impose set minimum standards of consumer protection that states would be free to exceed.

3. Require Car Dealers to Advertise Prices that Include All Non-Government Mandated Fees

Car dealers have a long history of bait and switch advertising of used vehicle prices. In

recent years, these abusive practices have most commonly involved advertising retail prices that fail to include set fees that all buyers must pay and that are not imposed by government. The most common of these fees is generally labeled a "documentary fee." These are fees that purport to compensate the dealer for filling out and filing registration and tax documents for the consumer. In some instances, state law mandates that the dealer perform the service, but does not mandate the dealer charge a fee. In other states, the dealer is not obligated to perform the service, but does so as a matter of course in most if not all sales.

Twenty or so years ago these fees were commonly in the amount of \$15 - \$35. Today, some dealers charge buyers as much as \$400 or more. The problem is that dealers seldom include the amount of the fees in the quoted or advertised prices for the vehicles. Thus, they come as a surprise to car buyers who most likely have spent several hours at the dealership, have completed trading in their old cars, and have completed a stack of documents, only to find out that there is more the dealer says they must pay than the price they negotiated. Dealers may even falsely represent that some law requires the dealer to charge for or collect the fee.

Charging for documentary fees may be unfair and generally is anti-competitive, and it is deceptive when the fees are not included in advertised or quoted prices. For the dealer, the amount of the documentary fee is nearly all profit. Consumers cannot accurately shop and compare purchase prices when dealers tack-on additional non-governmental fees at the end of a transaction, or reference them in tiny type at the bottom of a television or print advertisement. Congress may wish to consider banning the fees, capping them at some reasonable sum, such as

\$50.00, or requiring that advertised and quoted prices include any such fees.⁵

4. Ban “Spot Delivery” of Used Vehicles

A “spot delivery” occurs when a dealer sells a vehicle to a consumer and takes a credit application and allows the consumer to drive away with the vehicle (gives it to him “on the spot”) before credit has been arranged and agreed to by the consumer.⁶ It also often involves a consumer leaving his trade-in vehicle at the dealership. This arrangement leaves the consumer in a terribly vulnerable position. If his credit application is denied, the dealer will usually inform the buyer of that and that the dealer will be applying for credit for him again, but this time with less generous financing terms, usually involving a higher interest rate and, thus, higher monthly payments. If the buyer balks, asserting that the dealer promised there would be no problem obtaining the more beneficial terms and that he wants his trade-in back and to rescind the deal, the dealer responds that it is “too late” in that the dealer has sold the trade-in and that the buyer is obligated to permit the dealer to continue to shop for credit for him.

Some states have adopted guidelines in an attempt to limit the use of spot delivery in their states. Congress could eliminate the abusive aspects of this practice through legislation declaring it to be an unfair practice under the FTC Act for the sale of a car buyer’s trade-in vehicle unless and until an agreement has been reached on a purchase loan, and permitting the buyer to rescind a purchase contingent on financing if financing that is agreeable to the buyer is not found.

⁵ Some states have regulated documentary fees by state law including California’s \$55 cap, Cal. Veh. Code § 11713.1(b)(sales), and New York’s \$45 cap, N.Y. Comp. Codes R. & Regs. Tit. 15, § 78.19(d).

⁶ These arrangements are also sometimes referred to as “Yo-Yo sales.”

5. Expand the Federal Odometer Law to Cover False Statements or Non-disclosure of Salvage, Flood and Damage History

The federal odometer law⁷ has been in place since 1972. In those 37 years it has been relied on by used car purchasers to seek restitution from sellers who lied about the vehicle's true mileage or altered the actual odometer reading so as to reflect fewer miles. The more miles on a vehicle, the less it is worth. Past damage history has an even greater deleterious impact on used vehicle values. The existence of NMVTIS and several for-profit vehicle information providers means there is little excuse for a dealer failing to correctly disclose vehicle flood or collision histories to prospective buyers. Thus, Congress should strongly consider expanding the odometer law to provide remedies for state attorneys general, and for consumers via private actions, against sellers who intentionally misrepresent past vehicle flood or collision histories.

6. Increase the Cap on TILA to reflect Modern Financial Transactions

The Truth in Lending Act ("TILA")⁸ covers only credit transactions under \$25,000.⁹ While most used cars still fall under that limit, it will not be long before that limit is obsolete in the context of many used vehicle sales. It was set in 1968. In today's dollars, those 1968 \$25,000 would buy over \$151,680 worth of merchandise.¹⁰ It is time Congress mandate an

⁷ The odometer law was enacted as part of the Motor Vehicle Information and Cost Savings Act of 1972, and is codified at 49 U.S.C. §§ 32101-32711.

⁸ 15 U.S.C. §§ 1601-1666j.

⁹ 15 U.S.C. § 1603.

¹⁰ Determined on March 3, 2009, via use of the inflation calculator made available by the U.S. Bureau of Labor Statistics at <http://www.bls.gov/bls/inflation.htm>

increase in the TILA cap to reflect the impact of inflation over the past 41 years.

Raising the cap, even to as little as \$50,000, would have a substantial impact by ensuring that used car buyers who finance purchases are legally required to receive disclosures of the most important loan terms such as the amount financed, the total cost of credit, the annual percentage rate of interest imposed, the amount they are credited for down payments, and the number and amounts of each payment. This information is vital to shopping and comparing credit and can make a big difference to a lower income car buyer where even small differences in interest rates or other loan terms can make the difference between a vehicle being affordable.

III. Conclusion

Thank you very much for this opportunity to comment on these important matters. We have seen all too well the unfortunate results of a lack of government oversight in the mortgage loan market. Ironically, many of the practices that contributed to the mortgage meltdown were imported from long-standing bad auto sales or loan practices. While current market factors tend to damper the possibility of overreaching auto loan practices, the market surely will pick up again and Congress would be well advised to act now to better deter the harmful car dealer and lender practices cited above.

APPENDIX A

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November 19, 2008

By Electronic Mail

Federal Trade Commission/Office of the Secretary
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 Washington, D.C. 20580

RE: Used Car Rule Regulatory Review, Matter No. P087604

I. Introduction

We are writing in response to the request for comments issued by the Federal Trade Commission ("FTC") in the *Federal Register* of July 21, 2008,¹ regarding the Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455 ("Used Car Rule" or "Rule"). This comment is submitted on behalf of the Attorneys General of the following jurisdictions: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Northern Mariana Islands, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming (collectively, "Attorneys General"). We write as the primary law enforcement

¹ 73 Fed. Reg. 42285-42293 (2008).

officials in the United States who handle consumer complaints about used vehicle purchases and enforce laws designed to protect used motor vehicle purchasers.

Consumer fraud in used car sales has long been one of the most frequent complaints received by state Attorneys General. Our offices have a long history of enforcing state and federal consumer protection laws relating to used car sales, including joint Used Car Rule enforcement efforts with the FTC. In addition, the offices of state Attorneys General have advocated for many years for changes in federal laws to prevent fraud in used vehicle sales. This is an area we know well.

These comments also incorporate and fully support the comments of the International Association of Lemon Law Administrators (“IALLA”) – attachment A to these comments. These comments are the joint submission of the Attorneys General and IALLA.

The Used Car Rule has been in effect for nearly a quarter century. It was designed by the FTC with the stated intent to prevent oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage.² The Rule provides valuable information that used car buyers need in helping them decide whether to make an offer to purchase from a dealer and how much to offer. Whether a vehicle comes with a warranty is vital information for car buyers and the notice required by the Rule to be posted on used vehicles, the Buyer’s Guide, effectively conveys that information.³ However, the Rule’s value is limited by the fact that it does not provide notice about the most material information consumers need to consider and, indeed, do consider in deciding whether to purchase – that is the vehicle’s history and prior use, including its prior title status, damage history, and whether it was repurchased by the vehicle manufacturer pursuant to a state Lemon Law.

² 53 Fed. Reg. 17660 (1988).

³ However, as noted in the attached IALLA comments, it should be amended to require inclusion of information about available state warranty law coverage.

Nothing diminishes the market value of a used vehicle more than detrimental history.

That paramount information is included in the Buyer's Guide approved for use in Wisconsin, and we encourage the FTC to incorporate those portions of the Wisconsin model that relate to vehicle history and known prior use into the current national model as the version required across the nation. We also support inclusion of state statutory warranty and Lemon Law buyback information as urged in the attached IALLA comment.

In addition, vehicle history information is the subject of another federal effort, the National Motor Vehicle Title Information System ("NMVTIS"), a system intended to make both positive and negative vehicle history information available at a keystroke to American car buyers and law enforcement. The U.S. Department of Justice is expected soon to propose administrative regulations designed to fully implement NMVTIS. An improved Used Car Rule can supplement NMVTIS by adding this vital vehicle history information to the Buyer's Guide posted on the vehicle. An amended national Buyer's Guide including vehicle history information will do much more than the current more limited Buyer's Guide to prevent fraud and omissions of material fact about the most material fact one can know about a used vehicle – its damage, title, and Lemon Law history.

These comments explain why we advocate the above changes and also address other questions posed in the notice of rule review. We appreciate this opportunity to express our views on this matter of great public importance.

II. History of the Used Car Rule

The Used Car Rule was proposed in 1984, became effective in 1985 and, in essence, replaced an FTC rule that required car dealers to disclose certain known defects.⁴ The defect disclosure rule was vetoed by Congress in 1982, an action which subsequently was held by the

⁴ 49 Fed. Reg. 45,692 (1984).

Supreme Court to have been based on an unconstitutional federal provision.⁵ Following the Supreme Court action, the FTC re-examined the rule, deleted the defect disclosure requirement, and adopted the Used Car Rule in much the same form as it exists today. What remains is a Rule requiring used car dealers to post a notice (“Buyer’s Guide”) on a used vehicle offered for sale disclosing whether a warranty is being offered and its basic terms. The Rule also requires that the Buyer’s Guide disclosures be incorporated into the sales contract. The Rule further requires Spanish language versions when transactions are conducted in Spanish and that the Buyer’s Guide include certain consumer “tips,” including a warning that consumers not rely on oral promises not put in writing.

III. The Rule’s Effectiveness is Greatly Diminished by Not Addressing Vehicle History Information

The focus of the Rule is warranty information. But that is only one of a series of material facts that consumers should and do consider when deciding whether to purchase a used vehicle and how much to pay for it. Nothing can diminish a vehicle’s value more than prior damage.⁶ A vehicle which has incurred past substantial flood or collision damage, no matter how well-repaired, is worth substantially less than an identical vehicle without prior flood or collision damage.⁷ Market prices for used vehicles are affected by information. Consumers have made it clear they either do not wish to purchase vehicles they know incurred prior substantial collision or flood damage or, if they are willing to buy, will not pay close to pre-damage value. The

⁵ *United States Senate v. Federal Trade Commission and United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1983).

⁶ Prior salvage history may mean the vehicle has little or no value. Prior salvage history may result in a vehicle being uninsurable, in voiding the manufacturer warranty, and may result in the vehicle being unsafe to drive if collision damage was poorly repaired. *Automobile Fraud*, National Consumer Law Center, p. 354, 3rd Ed., (2007).

⁷ The following appeared on August 29, 2008, in the Q&A section of the website of the Kelly Blue Book vehicle valuation service, www.kbb.com: “My car is in good condition, but has a ‘salvage’ title. How does that affect the value? A salvaged, reconstructed or otherwise ‘clouded’ title has a permanent negative effect on the value of a vehicle. The industry rule of thumb is to deduct 20% to 40% of the Blue Book value, but salvage title vehicles really should be privately appraised on a case-by-case basis in order to determine their market value.”

popularity among consumers of vehicle history information services such as CARFAX and AutoCheck is a testament to the effect damage information has in the marketplace.

The market devalues these vehicles because consumers do not trust them to be mechanically and structurally sound or safe. The auto manufacturers show their distrust of them by voiding manufacturer warranties for vehicles with prior major collision or flood damage.⁸

States have responded to this concern by adopting laws requiring disclosures by vehicle sellers of information relating to prior collision or flood damage, including of title histories reflecting prior salvage or flood status and, in some cases, dollar amounts of damage.⁹ Congress recognized the import of this information in enacting a provision in the Anti-Car Theft Act of 1992 requiring the Secretary of Transportation to establish the National Motor Vehicle Title Information Service, a data base that would provide public access to critical information about the reliability and safety of used motor vehicles.¹⁰ Transportation failed to implement NMVTIS by the 1996 due date and Congress transferred responsibility for NMVTIS to the Justice Department in the Anti-Car Theft Improvements Act of 1996.¹¹ Those two laws form the basis of NMVTIS, discussed below in further detail.

⁸ Ford 2008 Taurus Model Owner Manuals provide as follows: "The New Vehicle Limited Warranty does not cover: . . . vehicles that have ever been labeled or branded as dismantled, fire, flood, junk, rebuilt, reconstructed, or salvaged; this will void the New Vehicle Limited Warranty."

Chrysler includes the following in the warranty information it has posted online for the Chrysler 2007 300 model: "A vehicle has no warranty coverage of any kind if: • the vehicle is declared to be a total loss by an insurance company; • the vehicle is rebuilt after being declared to be a total loss by an insurance company; or • the vehicle is issued a certificate of title indicating that it is designated as 'salvage,' 'junk,' 'rebuilt,' 'scrap,' or some similar word. DaimlerChrysler will deny warranty coverage without notice if it learns that a vehicle is ineligible for coverage for any of these reasons."

⁹ Examples include: Colo. Rev. Stat. § 6-1-708; Haw. Rev. Stat. § 481J-4; Iowa Code § 321.69; Me. Rev. Stat. Ann. Tit. 10, § 1475(2-A); Mass. Gen. Laws ch. 90, § 7N1/4(8); N.C. Gen. Stat. § 20-71.4; and S.D. Codified Laws §§ 32-3-51.5 to 32-3-51.9, 32-3-51.18.

¹⁰ Pub. L. 102-519, §§ 202-04 106 Stat. 3390-93 (1992).

¹¹ Pub. L. 104-152, § 2-3, 110 Stat. 1384 (1996).

In addition, various states have adopted laws requiring buyers receive pre-purchase notice if a used vehicle was once repurchased by its manufacturer under a state Lemon Law.¹²

Consumers are wary about purchasing such vehicles and, therefore, the market values of the vehicles are well below those of identical vehicles which had not undergone manufacturer repurchase.

Another material fact affecting a vehicle's value includes odometer mileage. Congress recognized this in 1972 by enacting a law requiring vehicle sellers to disclose odometer readings upon sale, including whether the reading is actual mileage, exceeds the mechanical limitations of the odometer (e.g., over 99,999 miles) or is not the actual mileage of the vehicle.¹³

In 2008, the expected mileage per gallon of used vehicles has become more material than ever and vehicle sales have clearly reflected that, with SUV sales tanking and higher mileage vehicles increasing significantly. Reliability, popularity of vehicle design and features, and resale value also play substantial roles in determining a used vehicle's market value.

But, it is the material facts *least available* to consumers that should be the focus of the FTC's effort to ensure that deceptive and unfair practices are not present in used vehicle sales. Vehicle design and features are a given. Dealers will use them as positive selling points. Consumers can judge with their own eyes, test-driving experience, and readings whether they like a particular year, make and model. Information about expected mileage per gallon for particular vehicles by year, make and model is also readily available to consumers through the EPA estimates and through information published in *Consumer Reports* and similar publications analyzing used vehicles. Odometer mileage disclosures are required by federal law for vehicles

¹² Examples include: Ala. Code § 8-20A-3, 8-20A-4, 8-20A-5; Alaska Stat. § 45.45.335; Ark. Code Ann. § 4-90-412; Colo. Rev. Stat. §§ 6-1-708(1)(b), 6-1-105(1)(x); Iowa Code §§ 321G.11, 321G.12; N.M. Stat. § 57-16A-7; N.C.G.S. § 351.3(d); and, Tex. Occ. Code Ann. § 2301.610 (Vernon).

¹³ The "Federal Odometer Act" was recodified in 1994 and is now found at 49 U.S.C. §§ 32701-32711.

less than ten model years old. That leaves consumers to identify the vehicle history and warranty information on their own.

The Buyer's Guide effectively communicates most of the information about available warranties to prospective buyers. However, the Wisconsin Buyer's Guide, approved by the FTC, does so much more than the nationally-approved Buyer's Guide by mandating disclosure of the most material information – the vehicle's history and prior use. The FTC should amend the Rule to require this information be included in the national Buyer's Guide.

IV. The Wisconsin Buyer's Guide Offers a Great National Model

The FTC approved Wisconsin's use of a differing Buyer's Guide in 1986, granting an exemption for Wisconsin under section 455.6 of the Rule, based on a finding that Wisconsin law “affords an overall level of protection to consumers that is as great as, or greater than, that afforded by the Used Car Rule.”¹⁴ The Wisconsin version, Attachment B, is based on a long-standing state regulation requiring vehicle inspections by used car dealers, and disclosure of any defects found in the inspection.¹⁵ Similar inspection requirements that were implicitly imposed in the precursor to the Used Car Rule resulted in industry opposition to that rule and the subsequent Congressional effort to veto that defect disclosure rule. We are not advocating reincarnating that long-ago debate. If an individual state has enacted, or does enact, legislation requiring vehicle condition reports similar to that included in the Wisconsin Buyer's Guide, the FTC has demonstrated that it will grant an exemption to permit use of that version in lieu of the national version.

However, there simply is no excuse for the national Buyer's Guide to fail to include vehicle history and title brand information. That information is readily available to dealers

¹⁴ 51 Fed. Reg. 20936-01 (1986).

¹⁵ Wis. Admin. Code Trans. § 139.04.

through private data sources and through title records accompanying vehicles they purchase at auction or take in trade. Additionally, that prior history is a determinant of whether the warranty the selling dealer claims is available truly is available. Auto manufacturers do not honor warranties for used vehicles that have been previously titled as salvage, flood or rebuilt. The Used Car Rule, at present, is all about warranty coverage. The Wisconsin Buyer's Guide requires the dealer to disclose if the manufacturer's warranty remains and, if not, whether that is due to prior salvage or other vehicle history. If Wisconsin dealers are required and can determine facts sufficient to make that disclosure, so too should dealers in the rest of the nation.

The Wisconsin version requires that the dealer disclose what brands the buyer's title will contain. We believe the national version should build on that, but should not be tied to what brands a new title will carry, making it dependent on state law. Instead, we urge that the FTC require the Buyer's Guide to disclose all of the following: 1) Past title history indicating prior salvage, damage or manufacturer buyback; and, 2) the Vehicle History using the Wisconsin checklist of: a) personal use; b) business use; 3) lease use; 4) rental use; 5) demonstrator use; 6) other; and, 7) prior use not known.¹⁶ The FTC's stated authority to adopt the Used Car Rule is the FTC Act, which includes making it unlawful to engage in deceptive or unfair practices in the sale of merchandise, including motor vehicles.¹⁷ The FTC clearly has authority to incorporate the above suggested segments of the Wisconsin model into the nation's Buyer's Guide.

The current FTC model truly is archaic, focusing only on warranty information, which remains material information but which pales in comparison in market materiality to prior

¹⁶ Wisconsin's Buyer's Guide also includes a box labeled, "Executive use" which we would discourage from being included in the national model due to past abuses of that term in the context of used car sales efforts labeling former rental and other vehicles purchased at dealer-only auctions as "Executive" vehicles, falsely implying that the vehicles were operated by high-level auto manufacturer employees and, therefore, were driven gingerly and given great care.

¹⁷ 15 U.S.C. § 45.

vehicle history. Adding known past use and past title history indicating damage, salvage, or manufacturer buyback would give the Used Car Rule teeth and true value to used car buyers. All too often consumers do not receive that information on title records they receive when they purchase a vehicle.¹⁸ Requiring dealers to include this information in Buyer's Guides will impose little cost to them. Leaving the Buyer's Guide as-is would result in maintenance of an outdated model of limited value to the auto buying public.

IV. NMVTIS and the Used Car Rule

By including past use and title history information as we suggest, the FTC would be acting in a manner consistent with Congressional intent in the context of NMVTIS. While the federal government has fallen far short of implementing NMVTIS by 1997, as required, it is our understanding that the Justice Department is on the verge of issuing a notice of proposed rulemaking. In addition, NMVTIS has been in use among state auto titling officials but is not yet accessible to the public and does not yet include vital data from auto insurance providers regarding vehicles the companies declared to be total loss.

Once NMVTIS is fully operational as Congress intended, it will be of great service to prospective used car buyers and to dealers who wish to avoid selling vehicles with significant prior collision or flood damage or which were repurchased by auto manufacturers under state Lemon Laws. While NMVTIS has great promise, it does not require the information it provides to be physically posted on a vehicle. It would take a dealer little time to use NMVTIS to discover any salvage, flood, or buyback title history and record it on a revised Buyer's Guide. The presence of this information on the Buyer's Guide would not duplicate NMVTIS in that consumers may not be aware of the availability of NMVTIS, but all would see a Buyer's Guide

¹⁸ The September 8, 2008 edition of *Automotive News* reported on the results of a new study that concluded that nearly 15% of the 1.5 million vehicles that were severely damaged by collisions, bad weather or fire in the first six months of 2008 now have clean titles that do not identify that damage.

posted on a vehicle offered for sale by a compliant dealer. With such little cost to comply, and with such great benefits to the used car buying public, adding these disclosures to the Buyer's Guide would result in an effective and efficient federal double-faceted assault on used car fraud.

V. Responses to Questions Raised in the Request for Comments

In its recent rule review notice, the FTC asked for input on a series of questions relating to the Rule. The response above relates specifically to the questions raised under the heading of "General Issues" in the Commission's request, especially those concerning a continued need for the Rule and how it might be modified to increase benefits to consumers.

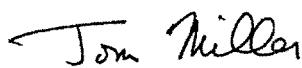
One specific question concerned the value of the list of major vehicle systems and possible defects. We view that information to be of very limited value in comparison to past vehicle use and history information and urge its deletion. The FTC also inquired about the value of the information on the Buyer's Guide regarding whether any of the manufacturer's warranty remains available. We view that as vitally important to potential buyers and urge its retention. We urge that it not be an optional disclosure, but be a mandatory disclosure. Dealers can readily learn whether the warranty applies. Frankly, it is a substantial selling point that most dealers would desire to feature.

VI. Conclusion

The Used Car Rule Buyer's Guide provides significant information to used car buyers. However, it is an outdated and unnecessarily limited tool in that it falls far short of providing the information consumers require to avoid being victims of unfair and deceptive practices in used vehicle sales. The Commission's goal should be to use its rulemaking authority to require disclosure of material information readily available to dealers to help the marketplace work effectively and efficiently. Limiting the Buyer's Guide to warranty information does not achieve

that goal. Amending the Rule to require the Buyer's Guide to include disclosures regarding vehicle history including prior negative title information, Lemon Law buyback, and known prior use will do much to deter unlawful conduct and prevent substantial consumer losses. Given the serious safety problems with some rebuilt wrecks, it will undoubtedly prevent injuries and save lives. We urge the Commission, in the strongest possible terms, to adopt the amendments we propose. It is time for the Commission to step up its efforts in this area and we wholeheartedly offer our support and look forward to working at your side should the Commission decide to upgrade the Rule as we suggest.

Very truly yours,



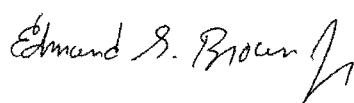
Tom Miller
Attorney General of Iowa



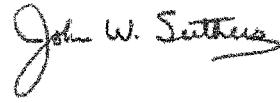
Terry Goddard
Attorney General of Arizona



Dustin McDaniel
Attorney General of Arkansas



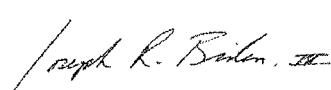
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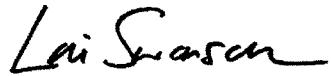
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Douglas F. Gansler
Attorney General of Maryland

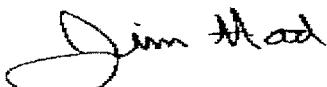
Martha Coakley
Attorney General of Massachusetts



Mike Cox
Attorney General of Michigan



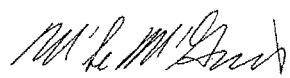
Lori Swanson
Attorney General of Minnesota



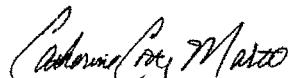
Jim Hood
Attorney General of Mississippi



Jeremiah W. Nixon
Attorney General of Missouri



Mike McGrath
Attorney General of Montana



Catherine Cortez Masto
Attorney General of Nevada



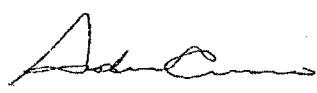
Kelly A. Ayotte
Attorney General of New Hampshire



Anne Milgram
Attorney General of New Jersey



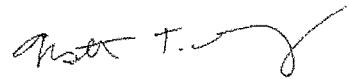
Gary King
Attorney General of New Mexico



Andrew M. Cuomo
Attorney General of New York



Wayne Stenehjem
Attorney General of North Dakota



Matthew T. Gregory
Attorney General of the Northern Mariana Islands

Nancy H. Rogers

Nancy Hardin Rogers
Attorney General of Ohio

Patrick C. Lynch

Patrick C. Lynch
Attorney General of Rhode Island

Larry Long

Larry Long
Attorney General of South Dakota

William H. Sorrell

William H. Sorrell
Attorney General of Vermont

James D. McGraw, Jr.

Darrell V. McGraw, Jr.
Attorney General of West Virginia

Bruce A. Salzburg

Bruce A. Salzburg
Attorney General of Wyoming

Hardy Meyers

Hardy Meyers
Attorney General of Oregon

Henry McMaster

Henry McMaster
Attorney General of South Carolina

Robert E. Cooper, Jr.

Robert E. Cooper, Jr.
Attorney General of Tennessee

Rob McKenna

Rob McKenna
Attorney General of Washington

J.B. Van Hollen

J.B. Van Hollen
Attorney General of Wisconsin

Attachments:

IALLA Proposed Comment Letter to the FTC (Attachment A)
Wisconsin's Buyer Guide (Attachment B)

Attachment A



August 29, 2008

Federal Trade Commission
 Office of the Secretary
 Room H-135 (Annex H)
 600 Pennsylvania Avenue, NW
 Washington, DC 20580

Re: "Used Car Rule Regulatory Review, Matter No. P087604

The International Association of Lemon Law Administrators (IALLA), established in 1997, is comprised of members and subscribers from the United States, Canada and Japan. Among its members are state consumer protection officials from California, Connecticut, Florida, Georgia, Hawaii, Minnesota, New Hampshire, New Jersey, Ohio, Texas, Vermont, Washington and Wisconsin. Its mission, in part, is to represent the interests of its member agencies on public policy and regulatory issues affecting consumers in the marketplace and to promote intergovernmental activities which reduce barriers to cross-jurisdictional enforcement of lemon laws.

IALLA appreciates the opportunity to comment on the Used Car Rule review and has two recommendations in response to part one of question 11: "What other changes to the format of the Buyers Guide should be considered to increase its benefits?" First, since the original rule was adopted in 1984, nine states, Arizona, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, New Mexico, New York and Rhode Island, have enacted laws specific to used cars. These laws mandate warranty/lemon law coverage periods ranging from 15 days/500 miles to 90 days/4,000 miles for either all vehicles or those sold above a certain price or within certain age and mileage limitations. Consequently, a revised FTC Buyers Guide should have a box (in a dealer warranty section) to indicate "state warranty law applies" if the vehicle is covered, with a space to indicate the warranty coverage period for the vehicle.

Second, all 50 states have lemon laws for new motor vehicles. When a manufacturer reacquires a vehicle due to a nonconformity, 41 states require disclosure of said fact to subsequent transferees and consumers. Fifteen states, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Minnesota, North Dakota, Ohio, Pennsylvania, South Carolina, Texas and Washington, require the manufacturer to warrant the repair of the nonconformity to the first subsequent retail buyer for a period of at least one year or 12,000 miles, whichever occurs first. Several manufacturers issue separate one year/12,000 mile limited warranties on their reacquired vehicles regardless of where the vehicle is resold.

The FTC Buyers Guide has not tracked these phenomena such that it does not apprise consumers who purchase vehicles that were bought back by the manufacturer of that fact or make them aware of specific warranty coverage. The Buyers Guides for Maine and Wisconsin, approved by the FTC, require that manufacturer buybacks be disclosed to prospective consumers. Likewise, a revised FTC Buyers Guide should have a box (in a non-dealer warranty section) to designate "manufacturer buyback" and a space to indicate the applicable manufacturer warranty coverage period on the nonconformity or the vehicle.

The current FTC Buyers Guide is out of sync with the plethora of lemon laws enacted across the nation during the past quarter century. It fails to account for the one million plus used cars sold each year with statutory warranty coverage. Consumers who buy these vehicles without knowledge of this fact are likely to be misled or deceived if the form is left blank or marked "as is." Modification of the form as prescribed above would substantially remedy this problem.

WISCONSIN BUYERS GUIDE

IV-2672 7/03/02



Information on this guide is based on what the dealership can find using reasonable care. You may learn more by following the suggestions on the back.

VEHICLE HISTORY

Check all that apply.

Personal use

Business use

Lease use

Rental use

Demonstrative use

Executive use

Other

History and use not known

TITLE BRANDS

Title will have these brands:

 Rebuilt salvage Transferred to insurance co. - damage claim paid Front damaged Manufacturer buyback Other:

Previously titled in:

ODOMETER READING

Odometer information will be on your title.

 _____ _____ _____ _____ _____ _____ _____

EXEMPT from odometer disclosure because vehicle is 10 or more model years old. Reading is not required.

WARRANTY

IMPORTANT: Ask for all promises in writing. Spoken promises are difficult to enforce. Warranty terms may be negotiable. Terms agreed to on the purchase contract are final.

Manufacturer Warranty

 Expired Known Cancelled due to salvage or other vehicle history Remaining vehicle mfr warranty - Call the mfr or refer to warranty booklet for details.

Limited Warranty

Refer to separate warranty document for coverages and exclusions.

Term:

_____ (months)

whichever comes first.

Percent of repair costs to be paid by buyer:

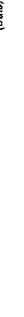
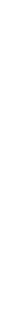
Deductible to be paid by buyer \$ _____

Transfer fee to be paid by buyer \$ _____

Pay to: Dealer Manufacturer

VEHICLE SERVICE CONTRACT

May be available for purchase. Ask for price, deductibles, coverages, exclusions and cancelability.

TITLE, NAME, ADDRESS		Year, Make, Model	Engine Size	No. Cyl.	Price
		VIN	Drive Type	4WD	\$
		Transmitter Name	4WD	AWD	Additional Service Fee
		Transmitter	Automatic	Manual	Stock Number
USED VEHICLE GENERAL CONDITION		VEHICLE EQUIPMENT REQUIREMENTS			
<input type="checkbox"/> Cooling System <input type="checkbox"/> YES <input type="checkbox"/> NO Coolant antifreeze safe to _____ °F <input type="checkbox"/> System problem		To safely and legally operate this vehicle on Wisconsin highways, all items listed below must be in proper working condition according to TRANS 305, Wis. Admin. Code.			
<input type="checkbox"/> Drive Train <input type="checkbox"/> Shifting problem		Legal <input type="checkbox"/> Brakes System <input type="checkbox"/> Parking Brake <input type="checkbox"/> Service Brakes			
<input type="checkbox"/> Abnormal noise or vibration <input type="checkbox"/> Visible cracks or damage to cases or housings		<input type="checkbox"/> Bumpers <input type="checkbox"/> Doors, Hoods and Trunk Lid			
<input type="checkbox"/> Electrical System <input type="checkbox"/> Charging system problem		<input type="checkbox"/> Emission Equipment <input type="checkbox"/> Dealer inspection does not ensure vehicle will pass state emission test where required.			
<input type="checkbox"/> Starting system problem <input type="checkbox"/> Ignition system problem		<input type="checkbox"/> Exhaust System <input type="checkbox"/> Fenders, Firewall, and Floor Pan			
<input type="checkbox"/> Engine <input type="checkbox"/> Signs of excessive oil consumption		<input type="checkbox"/> Frame or Structural Portion of Unibody <input type="checkbox"/> Fuel System			
<input type="checkbox"/> Abnormal noise <input type="checkbox"/> Signs of cracked block or head, or blown head gasket		<input type="checkbox"/> Horn <input type="checkbox"/> Lights			
<input type="checkbox"/> Electronic control module problem <input type="checkbox"/> Wires or backfires		<input type="checkbox"/> Restraining Devices and Seats - airbags, belts			
<input type="checkbox"/> Idles improperly, stalls, diesels <input type="checkbox"/> Belts missing, frayed, or cracked		<input type="checkbox"/> Speedometer and Odometer <input type="checkbox"/> Steering Components			
<input type="checkbox"/> Does NOT include timing belt <input type="checkbox"/> Charged from manufacturer specification		<input type="checkbox"/> Suspension <input type="checkbox"/> Tires and Wheels			
<input type="checkbox"/> Fluid <input type="checkbox"/> Fluid levels low <input type="checkbox"/> Known or visible leaks, excluding minor seepage		<input type="checkbox"/> Windshield, Windows and Mirrors <input type="checkbox"/> Windshield Defroster, Wipers and Washers			
<input type="checkbox"/> Gauges or Warning Devices <input type="checkbox"/> Gauge or device problem		Explain all items marked "YES" or "Not Legal": <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>			
<input type="checkbox"/> Indicate a system problem <input type="checkbox"/> Dash lights, 3rd and gauge lights problem		I certify to the best of my knowledge that the information provided on this guide is accurate.			
<input type="checkbox"/> Repaired Damage <input type="checkbox"/> Corrective welds or other evidence of repair to strut tower, floor, pan, frame or structural portion of unibody		Vehicle Inspector - Print Name: _____ (Print Name) <input type="checkbox"/> Not Equipped <input type="checkbox"/> ABS Brake System problem <input type="checkbox"/> Air conditioning system problem <input type="checkbox"/> Cruise control problem <input type="checkbox"/> Heating system problem <input type="checkbox"/> Power accessory problem <input type="checkbox"/> Sound system problem <input type="checkbox"/> Spare tire or jack missing 			
<input type="checkbox"/> Other Equipment		<input type="checkbox"/> Under signature I declare, Representing _____, I will receive a copy of this guide and the dealer will keep the original.  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date)  <input type="checkbox"/> (Date) <input type="checkbox"/> (Date) <img alt="Barcode" data-bbox="			

IMPORTANT CONSUMER INFORMATION

The Guide

Dealerships complete the Wisconsin Buyers Guide to report the existing condition of the used vehicle. Information on the Guide is based on what the dealership can find using reasonable care. The Guide cannot tell you everything you need to know. Test drive the vehicle. Have your own expert check the vehicle, if the dealership allows.

The Reasonable Care Standard Dealerships are required to test drive the vehicle and to inspect the interior and exterior of the vehicle, including under the hood and under the vehicle. They are not required to take the vehicle apart (except brakes) or run tests unless necessary to diagnose apparent symptoms.

Dealerships are required to report information they get from manufacturer and auction notices, prior owner documents and disclosures, and their own vehicle inspection and repair records. Dealerships are not required to contact prior owners or get records of previous titles unless necessary to clear up inconsistent or questionable information that is apparent.

Vehicle History and Title Brands

A vehicle's past may affect its performance, warranty, and value. Using reasonable care, dealerships report vehicle history, use and permanent brands that are on the title or will be on the next title as required by § 342.10 Ws. Stats.

Information on the Title

Be sure to read both sides of the title before you sign a purchase contract. Look more closely at a vehicle if the title shows:

- Mileage is not actual
- Title brands describing important vehicle history
- Many owners since last title was issued
- A dealership as titled owner.

This vehicle's previous owner, whose name and address are on the title, may provide useful information. The dealership will give you the name and address of the prior owner if you ask for it.

DEFINITIONS OF WHAT IS INSPECTED

Contract Agreements

You may agree to terms, such as warranty coverage, that differ from terms on the Guide. What you agree to on the purchase contract is final. Any important conditions or contingencies should be written on the contract to prevent misunderstandings.

Obligation to Remedy Undisclosed Problems

The disclosures on this guide are not a warranty. However, it's an unfair practice for a dealership to refuse to remedy any problem that should have been disclosed on the Guide if the problem:

- Existed at the time of sale
- Could have been found using reasonable care
- Was not disclosed, and
- Is reported to the dealer when discovered and the vehicle is made available to the dealership.

Manufacturer Recalls

Used vehicles may be the subject of manufacturer recalls that have not been performed. You may want to determine whether there are any unperformed recalls before you buy a vehicle or take delivery. Many manufacturers have a telephone number which may be called to obtain this information. For further information about how to inquire about recalls for this vehicle, ask the dealership or contact the Wisconsin DOT Dealer Section at the address or telephone number shown below.

Your Records

You will get a copy of the Guide if you purchase a vehicle. Keep copies on all documents and everything you sign. Division of Motor Vehicles, Dealer Section licenses Wisconsin dealerships and administers TRANS 139, Wis. Admin. Code Which requires the Guide. Ask your dealership for a *Wise Buys* brochure which explains dealer and consumer responsibilities, published by:

Wisconsin DOT Dealer Section
4802 Sheboygan Avenue, Room 806
P.O. Box 7509
Madison, WI 53707-7909
Consumer Assistance: (608) 266-0765

Brakes System

Brakes System includes rotors, pads, drums, shoes, parking brakes, and fluid leaks.

Bumpers

Bumpers includes either crash protection features.

Charging System

Charging system includes battery, alternator and voltage regulator.

Cooling System

Cooling System includes hoses, radiator, heater core, thermostat, fan, and water pump.

Doors, Hoods and Trunk Lid

Doors, Hoods and Trunk Lid includes hinges, locks and latches.

Drive Train

Drive Train includes the following, as equipped: transmission, transaxle, differential, U-joints, CV joints, transfer case and clutch.

Emission Equipment

Emission Equipment is listed on underhood EPA label. Vehicles must pass a state emission test within 45 days of sale if:

- Kept in mandatory testing counties, and GVM rating is 14,000 lbs. or less, and 6 model years old or older
- Fluid levels low includes the following, as equipped: engine, transmission, differential, transfer case, radiator, battery, brakes, power steering, and windshield wipers. Does not include AC or maintenance free battery.

Fluid Levels Low

Fluid levels low includes the following, as equipped: engine, transmission, differential, transfer case, radiator, battery, brakes, power steering, and windshield wipers. Does not include AC or maintenance free battery.

Frame or Structural Portion of Unibody

Frame or Structural Portion of Unibody includes damage, weakened by rust, repairs, alignment.

Fuel System

Fuel System includes tank, pump, carburetor or injector system.

Lights

Lights include all exterior lights.

Power Accessories

Power accessories include the following, as equipped: windows, locks, seats, mirrors, or antenna.

Restraint Devices and Seats

Restraint Devices and Seats include belts, and air bags.

Signs of Excessive Oil Consumption

Signs of excessive oil consumption includes

evidence of oil leaks, abnormal exhaust smoke,

burn oil odor, or piston ring blowby.

Starting System

Starting system includes ignition switch, solenoid,

starter, pinion, and ring gears.

Steering Components

Steering Components includes proper alignment.

APPENDIX B



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
IOWA ATTORNEY GENERAL
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
FACSIMILE: 515/281-4209

November 21, 2008

Via Electronic Mail

James Landon
United States Department of Justice
935 Pennsylvania Ave., NW
Washington, DC 20535

RE: National Motor Vehicle Title Information System
FBI Docket No. 117

I am writing in response to the request for comments issued by the Department of Justice ("DOJ") in the *Federal Register* of September 22, 2008,¹ regarding the DOJ's proposed rule to implement provisions of the National Motor Vehicle Title Information System ("NMVTIS"). I write as the primary law enforcement official in the State of Iowa whose office handles consumer complaints about used vehicle purchases and enforces laws designed to protect used motor vehicle purchasers.

Consumer fraud in used car sales has traditionally been one of the most frequent complaints received by state Attorneys General. Our office has long been a national leader in connection with the enforcement of state and federal consumer protection laws relating to used car sales. The Iowa Attorney General's office has very actively enforced the federal odometer law against used car sellers who misrepresented vehicle mileage.

¹ 73 Fed. Reg. 54544-54553 (2008).

In addition, this office has acted numerous times against dealers and individuals who concealed negative vehicle history, such as past damage or salvage history, when selling to unsuspecting buyers.² Additionally, an administrative rule adopted by this office makes it per se deceptive and, therefore, unlawful for used vehicle sellers to misrepresent the prior damage or salvage history of a used vehicle.³ The Iowa Attorney General's office also has long supported proposals at the federal level designed to deter used vehicle fraud, including NMVTIS.⁴ This is an area we know well.

Nothing can diminish a vehicle's value more than prior damage.⁵ A vehicle which has incurred past substantial flood, fire or collision damage, no matter how well-repaired, is worth substantially less than an identical vehicle without prior flood, fire or collision damage.⁶ Market prices for used vehicles are affected by information. Consumers have made it clear they either do not wish to purchase vehicles they know incurred prior substantial damage or, if they are willing to buy, will not pay close to pre-damage value. The popularity among consumers of vehicle history information services

² Iowa Code section 321.69 requires used vehicle sellers to provide buyers with written disclosures of prior damage and salvage history. Violations, per se, are violations of the Iowa Consumer Fraud Act, a law enforced by the Attorney General that empowers this office to seek consumer reimbursement and civil penalties, costs and injunctive relief against vehicle sellers.

³ 61 IAC 27.1 and 27.2.

⁴ Iowa Consumer Protection Division Director Bill Brauch has submitted congressional testimony on various occasions relating to auto damage and salvage fraud issues since 1994, including: 1994 testimony to the House Commerce Committee's Consumer Protection Subcommittee; 1996 testimony to the House Commerce Committee's Subcommittee on Commerce, Trade and Hazardous Materials; 1997 testimony to the Senate Commerce Committee; and 2005 testimony to the Senate Commerce, Science and Transportation Committee's Subcommittee on Consumer Affairs, Product Safety and Insurance.

⁵ Prior salvage history may mean the vehicle has little or no value. Prior salvage history may result in a vehicle being uninsurable, in voiding the manufacturer warranty, and may result in the vehicle being unsafe to drive if collision damage was poorly repaired. *Automobile Fraud*, National Consumer Law Center, p. 354, 3rd Ed., (2007).

⁶ The following appeared on August 29, 2008, in the Q&A section of the website of the Kelly Blue Book vehicle valuation service, www.kbb.com: "My car is in good condition, but has a 'salvage' title. How does that affect the value? A salvaged, reconstructed or otherwise 'clouded' title has a permanent negative effect on the value of a vehicle. The industry rule of thumb is to deduct 20% to 40% of the Blue Book value, but salvage title vehicles really should be privately appraised on a case-by-case basis in order to determine their market value." In the experience of the Iowa Attorney General's office, average lost retail value is generally higher than the 20% to 40% range stated above.

such as CARFAX and AutoCheck is a testament to the effect damage information has in the marketplace.

The market devalues these vehicles because consumers do not trust them to be mechanically and structurally sound or safe. The auto manufacturers show their distrust of them by voiding manufacturer warranties for vehicles with prior major collision or flood damage.⁷

States have responded to this concern by adopting laws requiring disclosures by vehicle sellers of information relating to prior collision or flood damage, including of title histories reflecting prior salvage or flood status and, in some cases, dollar amounts of damage.⁸ Congress recognized the import of this information by requiring the establishment of NMVTIS as part of the Anti-Car Theft Act of 1992.⁹ The Department of Transportation failed to implement NMVTIS by the 1996 due date, as required by the Anti-Car Theft Act, and Congress transferred responsibility for NMVTIS to the Justice Department in the Anti-Car Theft Improvements Act of 1996.¹⁰

I strongly support DOJ's proposed rule. The rule is well crafted to achieve Congress' intent in establishing NMVTIS, as you stated it in your notice of proposed rulemaking, to provide an electronic means for verifying and exchanging motor vehicle

⁷ Ford 2008 Taurus Model Owner Manuals provide as follows: "The New Vehicle Limited Warranty does not cover: . . . vehicles that have ever been labeled or branded as dismantled, fire, flood, junk, rebuilt, reconstructed, or salvaged; this will void the New Vehicle Limited Warranty."

Chrysler includes the following in the warranty information it has posted online for the Chrysler 2007 300 model: "A vehicle has no warranty coverage of any kind if: • the vehicle is declared to be a total loss by an insurance company; • the vehicle is rebuilt after being declared to be a total loss by an insurance company; or • the vehicle is issued a certificate of title indicating that it is designated as 'salvage,' 'junk,' 'rebuilt,' 'scrap,' or some similar word. DaimlerChrysler will deny warranty coverage without notice if it learns that a vehicle is ineligible for coverage for any of these reasons."

⁸ Examples include: Colo. Rev. Stat. § 6-1-708; Haw. Rev. Stat. § 481J-4; Iowa Code § 321.69; Me. Rev. Stat. Ann. Tit. 10, § 1475(2-A); Mass. Gen. Laws ch. 90, § 7N1/4(8); N.C. Gen. Stat. § 20-71.4; and, S.D. Codified Laws §§ 32-3-51.5 to 32-3-51.9, 32-3-51.18.

⁹ Pub. L. 102-519, §§ 202-04 106 Stat. 3390-93 (1992). The system did not carry the NMVTIS name until the passage of the 1996 legislation cited in footnote 10.

¹⁰ Pub. L. 104-152, § 2-3, 110 Stat. 1384 (1996)

title, brand, and theft data among motor vehicle administrators, law enforcement officials, prospective purchasers and insurance carriers.

NMVTIS has been in use among state auto titling officials for some years. To date, however, the success of NMVTIS has been hampered by lack of data and lack of access for consumers and others who would benefit greatly from the information contained in the data base. Insurance companies have not been supplying information about vehicles they total and take ownership of, and not enough states are supplying data. Therefore, while NMVTIS currently is of significant benefit to law enforcement, it has not yet approached its full potential. Once insurance data is routinely supplied, the vast majority of states (if not all) are supplying data, and consumers have access at little or at nominal cost, NMVTIS will finally realize its great value to the vehicle marketplace.

Prospective vehicle purchasers, whether individuals, businesses or agencies, need information in order to make informed choices about whether to purchase a particular used vehicle and how much to pay for it. The marketplace doesn't lead to efficient pricing unless buyers can be made aware of and take into account material information that will determine the market value of a particular vehicle. Nothing can diminish the market value of a motor vehicle more than prior collision, fire, water or flood damage.¹¹ Many vehicles considered to be total loss vehicles by insurance companies do not result in the issuance of state auto salvage titles. This rule helps plug that major gap by requiring insurance companies to report totaled vehicles including those of the current model year or any of the four prior model years. Many insurance companies already report this data to an industry data base maintained by the National Insurance Crime

¹¹ We were very pleased to see diminished value included in the calculation of "total loss" in the proposed rule. DOJ must resist any suggestion to delete it from this definition. It is a key component of vehicle market values.

Bureau. Therefore, complying with this proposed rule should be result in any significant cost increase for industry. It is unfortunate that the federal law does not require including older vehicles, but I strongly support DOJ's strong encouragement in the rulemaking notice that insurance carriers report salvage and junk vehicles regardless of model year.¹²

I also strongly support DOJ's inclusion of lenders who are financing the purchase of autos, and auto dealers, among those who may access vehicle information through NMVTIS. Lenders have a strong interest in financing vehicles purchased at their true retail values, and generally would not want to find themselves in the position of having made a loan for a sum greatly exceeding a vehicle's true retail value, resulting in the loan being substantially undersecured. Honest car dealers have a strong interest in not giving greater value for a vehicle taken in trade or purchased at auction than its true worth, or of being accused by their customers of selling vehicles without disclosure of past history that diminishes market value, resulting in defrauded customers. Thus, enabling lenders and car dealers to have access to NMVTIS will help ensure that consumers do not unwittingly purchase one of these vehicles.

I was heartened by the inclusion of salvage pools as mandatory reporters to NMVTIS. This requirement will help close a significant loophole in the used vehicle marketplace and further deter fraudulent used car sales, vehicle theft, and vehicle part theft.

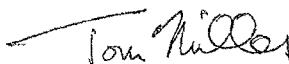
¹² I also strongly encourage DOJ to review the comments of the National Association of Attorneys General submitted Nov. 19, 2008 to the Federal Trade Commission in response to its request for input on its Used Motor Vehicle Trade Regulation Rule, wherein 42 Attorneys General, led by this office, encouraged the FTC to require that its "Buyers Guides" that used car dealer are required to post on used vehicles offered for sale include vehicle history disclosure concerning past salvage, flood or collision damage and manufacturer repurchase under a state Lemon Law. The Buyer's Guide notice is required, regardless of vehicle age.

I also appreciate DOJ's proposal to make NMVTIS information available to law enforcement officials at no cost. Pursuing vehicle theft and auto title fraud is a big task and requires a team effort across agencies at all levels of government. Our success in this vital effort depends on enabling all levels of law enforcement to have swift and cost-free access to the system.

Finally, while I understand the need for the NMVTIS program to be self-sustaining, given the vital importance of the information NMVTIS conveys to consumers, I strongly encourage DOJ and the NMVTIS operator to minimize to the greatest extent possible any cost to consumers for accessing the data base. Those consumers who are most in need of the information NMVTIS can convey may tend to be in lower income brackets and having to pay for this key information will deter some from seeking it. For this system to work, it has to be accessible for those who need it the most.

Thank you for this opportunity to comment regarding this proposed rule. I strongly support it and offer whatever assistance our office can provide to DOJ as it finalizes the rule and begins implementation. NMVTIS is incredibly important to our ongoing local, state and federal efforts to deter fraudulent used car sales practices and auto theft. The improved safety of consumers and their families, and the savings that consumers, auto dealers, and lenders will realize from the greatly enhanced transparency this rule will facilitate, demonstrate the extraordinary importance of this rule.

Very Truly Yours,



Tom Miller
Attorney General of Iowa

Mr. RUSH. To all the witnesses, we certainly hope that the NMVTIS system will be a useful system when it is fully implemented but it is only available online. Its use will be limited. A shopper comparing several cars at a used car lot may not be able to leave the lot, find a computer and log on to access information about the different cars. At some point buyers may not have a credit card to even pay for this report. Now, several of you mentioned in your testimony the value of having this information available to buyers at the time of the sale, and I would like to explore for a couple moments how this can be done.

Ms. Shahan, you recommend that adding National Motor Vehicle Title Information System information to the buyer's guide that is currently required to be posted prominently on the car, that this will help. Is my assessment of what you recommended, is that correct, and can you explain why this is the right place for this information to be displayed on the vehicle?

Ms. SHAHAN. Yes, Chairman Rush, you are totally right. We strongly recommend and we have for a long time that there be disclosure on the used car buyer's guide and it won't apply to cars that are private-party sales but we believe that consumers have a different expectation. When you walk onto a car lot and you are buying a car from a licensed dealer, you tend to think that it is different from buying from Joe Schmoe on the street. So since 1985, the Federal Trade Commission has required all used car dealers in the country to post a used car buyer's guide on the car. It is very minimal in the level of protection it gives consumers now. It could be far more valuable if it also included whether the vehicle was in the National Motor Vehicle Title Information System as having been salvaged, and, you know, if I had my way, actually those cars would be segregated on the car lot and like cordoned off so that they are not mixed in with other cars. Because these are cars that overwhelmingly with very rare exceptions pose a real safety hazard to the public. They may have bent frames. The Katrina cars, the flood cars, if they are saltwater flooded, all the electronic systems in those cars are going to corrode. They are basically rotting from the inside out. There is no way they can possibly be made safe, and a car with a bent frame, if it is an SUV, it is very likely to roll over in an emergency braking situation or even just in normal use if it is in a subsequent collision. The cars today are built with unibody construction so that they in order to protect you have to have some structural integrity, and if they have already been in a crash severe enough that they had to be totaled, chances are very good that they don't have that same structural integrity.

Mr. RUSH. Thank you very much. I really appreciate your answer.

Let me move on to Mr. Burch. Mr. Burch, you noted that DOJ is exploring methods of access that do not rely on the Internet or credit cards. Would you please care to elaborate?

Mr. BURCH. I will. Thank you, Mr. Chairman. We have talked with each of the consumer access providers that are currently making access to NMVTIS available to see if they have the business processes established to accept requests for payment via mail where it could be provided via check, et cetera, or some other type of payment process that does not involve commercial credit. They

are looking into that and have promised to get back to us, but we are also looking at other options as well. In particular we know that some of the nonprofit organizations that are dedicated to addressing these kinds of issues specifically, particularly the consumer organizations, we have asked that they consider being a consumer access portal provider. We would like to facilitate that. Additionally, we have asked the States to consider being a consumer access portal provider where consumers can walk up to the counter and pay for and request a NMVTIS search there in person, which clearly would not require credit. So we are looking at all of those options.

Mr. RUSH. Thank you.

Mr. Whann, in your testimony you express some concerns about including NMVTIS information in the buyer's guide, arguing that dealers could be liable for gaps in the NMVTIS database. First of all, is that correct, and would you please explain it more?

Mr. WHANN. Yes, Mr. Chairman. I think everyone can agree that a car that has been damaged and been repaired improperly is unsafe and shouldn't be on the road, and cars that have been in a flood or had saltwater damage, that is the most insidious. The problem isn't necessarily with the disclosure of the information but the problems it causes. If NMVTIS was a database that was comprehensive and everyone had access to it, dealers would be happy to pass on the information that is available to them. The unfortunate reality is, is this database is being updated on an ongoing basis so when a dealer takes a car in on trade or purchases one and completes the FTC sticker, that information might be accurate at that time and the very next day may be inaccurate. We also have concern that consumers would rely too heavily at this point on information that is not going to be complete and therefore if a statement posted on the motor vehicle is there, it is going to be considered an advertisement under the State's unfair and deceptive practices act and the dealer is going to be liable for the untruthfulness of the report that they can't control. I think NMVTIS is a very useful tool and I think there will come a day when there will be access and we can talk about that type of disclosure. We just don't think we are here yet.

Mr. RUSH. Thank you very much.

My time is up, so I will now recognize the ranking member, Mr. Radanovich, for 5 minutes for purposes of questioning the witnesses.

Mr. RADANOVICH. Thank you, Mr. Chairman, and good morning to all the witnesses. Thank you for your testimony. It is a pleasure to have you here today.

I am going to start off with you, Mr. Waldron, if I may. I have a couple questions about NMVTIS and how you being somebody who is in the business as well and the relationship that you might have with that reporting system. What would be the NMVTIS system, what would it do to existing contracts that you have to purchase data from States, salvage yards and insurance companies?

Mr. WALDRON. At this point we are continuing to work with the States and all of those companies and we don't see a specific difference under NMVTIS itself. The total-loss disclosure, on the other hand, would give us the ability if we can get that on a consumer

basis, you know, to put that out into our Auto Check Vehicle History Report so that would be very helpful for us.

Mr. RADANOVICH. I think what you would like to see if NMVTIS can be a resource to you, for you to be able to gather the information just as much as you gather the information from the State of California or from salvage yards or the like. Is that correct?

Mr. WALDRON. That is correct. NMVTIS would in doing that make a good source of information. We have in the past, you know, as you mentioned earlier, filled that void. For example, after Hurricane Katrina we put out a free database so that consumers could check to see if their vehicle that they might consider purchasing had been in the hurricane zone at the time of the hurricane. That was before the States or insurance companies or anybody else could do anything. At least we could offer consumers a level of protection to say check this for free and see if this vehicle might have been here for them to ask more questions.

Mr. RADANOVICH. Do you view NMVTIS as being a threat to your private enterprise or—

Mr. WALDRON. As it is written we do not view NMVTIS being a threat because we provide a lot more information. Should NMVTIS continue to morph into something larger and larger and larger, it could certainly become competitive with what we are doing in the private sector.

Mr. RADANOVICH. Very good. Thank you, sir.

Mr. Whann, a couple of questions. What cost do you or the manufacturer bear for compliance due to State and federal laws, and does the consumer bear these costs in the sale price of the vehicle?

Mr. WHANN. Well, I think any costs obviously that relate to compliance with those type of issues at some point are going to be rolled into the cost of doing business. So there are some costs such as title and filing fees and some of those type of things that are directly passed on to the consumer. When we talk about things like documentary fees, most of those are established by State laws except those that don't have caps and therefore that is like any other charge that could be levied—

Mr. RADANOVICH. That is a vote call. You can choose to talk through it.

Mr. WHANN. OK. Thank you.

Mr. RADANOVICH. It goes on all the time.

Mr. WHANN. So those charges are not passed on but I will tell you, with the amount of regulation that has been placed upon car dealers in particular, Gramm-Leach-Bliley Act, the safeguards rule, the red flags rule, the cost of compliance today is immeasurable. You couldn't go and put a dollar amount on it. Cost of compliance is cost of doing business and it is not directly passed on to the consumer but realistically speaking, it is included in the cost of doing business.

Mr. RADANOVICH. Can you give me too a sense of how much the consumer pays in State and local taxes and fees in the average purchase of a car? Can you give me a ballpark figure?

Mr. WHANN. It varies across the country. I know that in some States documentary fees are less than \$100. In probably the vast majority if you looked at an average, it may be in the \$250 range. There are some that don't cap them and, you know, we have heard

some researcher testimony today that it could run as high as \$400 to \$700. I don't have any research to suggest that. You know, taxes obviously, the sale tax on the car, and then title and filing fees are usually, I will say nominal in the terms of thousands but when you are buying a car, every \$10 or \$20 bill in there if you can't afford to buy the car obviously is significant.

Mr. RADANOVICH. Thank you, Mr. Whann.

I have one more question for Ms. Harrington. Is the FTC equipped with the manpower to enforce its Used Car Rule or is enforcement better left up to the States?

Ms. HARRINGTON. Well, as I indicated, the FTC has partnered from the beginning with the States and it really depends I think on the market and the size of competitors in the market as to whether it makes best sense for State and local government to take the lead or the FTC. In Chicago, for example, for a long time we have partnered with the commissioner of consumer services and sometimes with the State of Illinois Attorney General Office's to join forces for Used Car Rule enforcement.

Mr. RADANOVICH. Last question is, are violations of the Used Car Rule a problem of national scope or so widespread in nature that it fits into the FTC's prioritization?

Ms. HARRINGTON. No.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. RUSH. There is a vote going on right now. We have 12 minutes and 20 seconds unless we want to proceed to Ms. Schakowsky for 5 minutes. The chair does intend to have a second round of questions if members would want to return. But there is a vote. I think there will be four votes in succession, so the chair will recess the subcommittee and then come back for an additional round of questions if we don't complete the first round before we have to depart for votes.

The chair recognizes Ms. Schakowsky for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

Ms. Harrington, you said in your testimony that the Commission will give careful consideration to all comments and suggested amendments to the Used Car Rule as it determines next steps. Have you heard anything today in the testimony that would suggest that there ought to be changes to the rule?

Ms. HARRINGTON. What we have heard today I think is reflected in the comments that we have received so I haven't heard anything today different than what we have seen in the comments.

Ms. SCHAKOWSKY. And so what is it that you might be contemplating changing in the Used Car Rule?

Ms. HARRINGTON. Well, there are questions that we always look at when we do a rule review about whether there are changed market conditions that should require consideration of additional provisions in a rule. There are questions about whether the rule is needed, is this the best approach. You know, when we do rule reviews, we start with a very basic question about—

Ms. SCHAKOWSKY. Well, let us see if there are other concrete suggestions here about changes to the rule so we are sure that if there is anything new you have gotten it.

Mr. Van Alst?

Mr. VAN ALST. Yes. Thank you. There are several changes that we certainly recommend and we have submitted comments on behalf of our low-income consumers for changes that we think would be most effective in the Used Car Rule. You have already heard today that there is a very urgent need to make sure that the results of the NMVTIS would be available to consumers at the time that they are looking at buying a car and the best place to do that is to have it directly on the car. Currently the Used Car Rule doesn't really disclose much about the car other than the existence of the warranty and certainly even NIADA previously in its comments earlier back in the early 1980s on the Used Car Rule said that there would be a fair balance for dealers to disclose known defects to consumers as part of the Used Car Rule so certainly what we see here is a lack of balance of information, things that the dealers know and the consumers don't, and so if we could make that a part of the disclosure to make sure that if the dealer knows there is a defect with the car they ought to go ahead and disclose that at the time that they are selling the car.

Ms. SCHAKOWSKY. So that seems to be a common theme of what information ought to be available on the car, and I imagine a number of the comments include that. Is that something that you are considering putting in the rule?

Ms. HARRINGTON. Certainly.

Ms. SCHAKOWSKY. Let me ask about other federal issues that we could address, minimum standards nationwide, for example, for title brands. A State like Arizona might not have a title brand for flood damage obviously. It is not a common reason for cars to be destroyed in that State. But the absence of a flood brand made such States ripe for title washing after Hurricanes Rita and Katrina. Let me ask Ms. Shahan, do you believe that there should be minimum standards across the States for signing the title brands most important to consumer safety?

Ms. SHAHAN. I think that is a complicated issue, and I wish I had a simple answer for you but, you know, the title brand is not that helpful for consumers frankly because consumers usually don't see the title before they buy the car. Most consumers are getting a loan so the title goes to the lien holder and the disclosure to consumer, really, you know, having it on the car buyer guide is far more useful. And what we are hoping is with NMVTIS, since insurers are going to be providing data on all the cars they total, regardless what is on the brand and there are some insurers, you know, who have violated the law and not properly branded titles even when they are supposed to, if they are captured in NMVTIS anyway, then a lot of these problems about title washing across State lines or lack of uniformity get addressed because you have uniformity by virtue of having uniform access to the same information regardless what goes on with the brand, and that is one reason we felt so strongly about having DOJ issue the rule, and frankly we are not really anxious to have DOT and NHTSA get in on the act. We believe that properly DOJ should keep that program and keep implementing it, and if we want to tweak the law and tighten the timeframe for insurers to report the data to NMVTIS, great, let DOJ handle that.

Ms. SCHAKOWSKY. That is helpful. Thank you.

Thank you, Mr. Chairman.

Mr. RUSH. Mr. Sarbanes, you are next. However, we have about 6 minutes, 41 seconds. If you want to, the chair will wait with you for 5 minutes.

Mr. SARBANES. OK. I will go ahead. I will try to dash over there.

Mr. RUSH. Mr. Sarbanes is recognized for 5 minutes.

Mr. SARBANES. Thank you, Mr. Chairman.

I am most interested in the financing part of the discussion that you presented today and I would ask you, Ms. Shahan and Mr. Van Alst to maybe describe what you view as the most egregious practices when it comes to the financing of autos.

Mr. VAN ALST. Sure. I would be happy to. Obviously many of these practices are difficult to easily describe but there are a few that I think in just a sentence or two I can explain to you. We see a lot of the same things happening in car finance that we have seen create such problems in the home mortgage industry. We have seen when someone goes in to buy a car, there is fraud involved in the applications, there is fraud involved in the amount of the down payment that is represented to the lender, and the reason all this arises is because the incentives are so skewed. The incentive for the dealer is to get this deal done and especially if they can get a kickback from the lender if they can increase the amount of the interest rate, they make more money. They don't have any interest in whether or not the consumer can actually pay for this car. So obviously their incentive is to get the deal done and it really hampers any efforts to try to make sure that there is a fair transaction. The same way that appraisers, you know, created false appraisals in the mortgage industry created such a problem, a lot of the current flaws in trying to get accurate information about these vehicles, whether or not there is damage, creates the same problem in this instance. If you buy a car with significant damage that you aren't aware of, well, it is really going to make you either unable or less likely to make your payments, you know, six months down the line when the car either doesn't run or you have had an accident because of the frame damage.

Mr. SARBANES. Who are the financing companies that are doing this? Describe some of the financing entities that are in the mix here.

Mr. VAN ALST. There is a range. There are some very large national financing companies which were predominantly the defendants in the class action lawsuits that I mentioned that we had regarding dealer markups and their disparate racial impact where they were charging higher dealer markups to African-Americans and Latinos but then there are also a number of regional finance companies that do a smaller business and then as was alluded to earlier, there are also the buy-here, pay-here places where the dealer is financing the purchase of the car there on the lot and there the business model really is to try to get a down payment that is the full price of the car and any payment the consumer makes is kind of gravy.

Mr. SARBANES. Are those finance companies packaging those loans and selling them up the line like we have seen in the mortgage industry?

Mr. VAN ALST. They definitely are.

Mr. SARBANES. And where are they selling them?

Mr. VAN ALST. They are securitized and sold on Wall Street the same way that the mortgages are.

Mr. SARBANES. Have you seen any evidence as we saw in the home mortgage industry of people at the higher levels putting pressure, having an appetite for those securitized loans that translated into these financing companies going out and looking for more subprime borrowers?

Mr. VAN ALST. That is the business model pretty much, yes.

Mr. SARBANES. Well, I mean, I am going to cut short my questioning so we can get over to vote but my interest is in the hidden hand here, and we can focus a lot on the consumer protections that are required for that, you know, on the car lot transaction and those are very important, but when it comes to this subprime culture and the predatory lending that goes on, you can trace it back or you can trace it up to players who would probably have familiar names based on the inquiries we have made into the home mortgage arena, and I am very curious to see where the fingerprints of this hidden hand are, and we are seeing it in the auto industry as we saw in the home mortgage industry and there is probably other places as well and so the inquiries will continue.

Thank you, Mr. Chairman.

Mr. RUSH. The chair thanks the gentleman. The chair will invite the witnesses if they will remain, we have a series of about four votes, and when we come back we will conclude the first round and then if there is interest we will have a second round of questions. So I would just beg you to please remain with us for a while. Thank you so much.

The committee stands in recess now. We will convene 15 minutes after the last vote.

[Recess.]

Mr. RUSH. The committee will be called back to order. Again I want to thank the witnesses for your patience, and now without any further delay, Ms. Sutton, you are recognized for 5 minutes of questioning.

Ms. SUTTON. Thank you, Mr. Chairman.

Mr. BURCH, as I indicated in my opening statement, Ohio is fully participating in the National Motor Vehicle Title Information System but under the rules, States aren't required to fully participate until January 1, 2010. Do you expect that all 50 States and the District of Columbia to be in the system by January of 2010?

Mr. BURCH. Yes, ma'am, that is our expectation at this time. We had conversations with States and I know that some of the States have concerns about meeting that date but we have assured them that we will work with them, make it a priority to work with them to meet that date.

Ms. SUTTON. And just so I can get a little bit more clarification, there are 10 States described in your testimony as in development. Can you just tell me what that means, where things stand?

Mr. BURCH. Yes, ma'am. In development means that these States have established a timeline for establishing their participation either at the data provision level or their full participation. They have established a timeline. They have identified resources and are actively working towards meeting those goals and so my under-

standing is that some of those—I apologize. Are you asking about the gray States in development or the 10 States in development or the States that are not participating?

Ms. SUTTON. The 10 States that are in development and then of course there are 14 that aren't participating at all, so I want to know about them both.

Mr. BURCH. OK. So the 10 states in development have identified a timeline, they have identified the resources. They are working towards participation. That is my understanding that as soon as—within the next 90 days some of those States may have completed some of the initial processes and their data may begin to be contributed to the system. In terms of the 14 that are not participating, as I mentioned previously, we have had conference calls and meetings with a number of those States and we are now in the process of arranging individual conference calls and consultations with those States to identify in which ways we can be helpful to them in meeting the January 1, 2010, deadline. I also expect that some of those States may have submitted a proposal. We recently had a solicitation on the streets to provide some funding support for States that are not participating to bring them online, and it is my understanding that some of those States may have also applied for those funds.

Ms. SUTTON. And what about California, who is providing data to the system but not allowing it to be shared with the public?

Mr. BURCH. That is something that we are working on on a daily basis right now with the point of contacts in the California Department of Motor Vehicles. I think it has been mentioned already, this is the subject of a federal district court order that requires us to work together with California and with the plaintiffs in the litigation to try to resolve these issues. Right now our timeline is to have these resolved by the end of this month.

Ms. SUTTON. OK. And if I could just move quickly, Ms. Harrington, I am a bit perplexed by some of the answers that you have given to questions earlier in the discussion. Following up on Ms. Schakowsky and some other things that I have heard here, the Used Car Rule does not require the disclosure of the condition or history of the vehicle even if the dealer is aware of specific defects, correct?

Ms. HARRINGTON. Right.

Ms. SUTTON. OK. And last year the FTC sought public comment regarding the Used Car Rule, and in your testimony you state that the Commission is currently giving careful consideration and you restated that here again when you were asked about if you heard anything here today, and of course then Mr. Van Alst gave us a lot of information here, whether or not you heard anything here that would change or add to your determination, and I didn't really understand your answer. You just said we consider a lot of things, and I guess I am just perplexed about, you know, the comment period closed 4 months ago. What is your timeframe for making a decision?

Ms. HARRINGTON. This is a rule review. It is not a rulemaking.

Ms. SUTTON. OK.

Ms. HARRINGTON. The timeframe, I would expect that there will be a recommendation for the Commission shortly. The require-

ments for rulemaking under the Federal Trade Commission Act are not the same as the requirements for rulemaking that most agencies use under the Administrative Procedures Act. The Federal Trade Commission Act has very cumbersome and slow procedures in it and so I can't give you a timeline if the Commission should commence a rulemaking because—

Ms. SUTTON. OK, but when are you going to make decisions about the comments that you received?

Ms. HARRINGTON. Well, as I said, the staff should have a recommendation for the Commission I would think within the next month. I am not the Commission so I can't say when it will make decisions. But what I want to caution on is that the provisions in the Federal Trade Commission Act that govern rulemaking are such that, for example, in the original rulemaking under the Used Car Rule, that went on for years because interested parties have a right to request hearings, and then the Commission has to conduct hearings in numerous locations and make available for cross-examination all interested parties.

Ms. SUTTON. And Mr. Chairman, I know I am out of time but I am hoping that we will have opportunity to follow up. Thank you.

Mr. RUSH. There will be a second round of questioning.

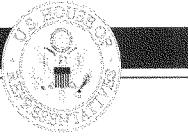
The chair now recognizes the gentlelady from California, Ms. Matsui.

Ms. MATSUI. Thank you, Mr. Chairman, and thank you very much for calling today's hearing. I would like to thank today's panelists for sharing their expertise with us today and I especially would like to welcome Rosemary Shahan to our panel. She comes from Sacramento, and her organization, Consumers for Automobile Reliability and Safety, is well respected and widely viewed as one of the country's leading voices on car condition issues, and I am really happy she is here today.

One of the questions I wanted to ask was about subprime car financing. My home district of Sacramento is among the hardest hit cities by home foreclosures, and unfortunately, like many of our homeowners, California car buyers are also victim to predatory car financing loans. Many consumers were steered into subprime car loans. I understand that some auto financing practices closely resemble the predatory lending practices that have affected so many homeowners. Thus I think this is a good opportunity to shed light on how these issues are intertwined.

[The prepared statement of Ms. Matsui follows:]

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Member of Congress

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Rep. Doris Matsui Advocates for Increased Consumer Protection in the Used and Sub-Prime Car Market

Calls for Full Disclosure to Consumers of Financial Terms

WASHINGTON, D.C. – Rep. Doris Matsui (CA-05) spoke at the Commerce, Trade, and Consumer Protection Subcommittee Hearing today on the topic of “Consumer Protection in the Used and Subprime Car Market.” Below are her remarks as prepared for delivery:

“Chairman Rush, thank you for calling today’s hearing. I applaud your leadership on this issue. I look forward to working closely with you – and with all the members on this Committee – on this issue.

“I would also like to thank today’s panelists for sharing their expertise with us today. In particular, I’d like to welcome Rosemary Shahane to our panel today. Rosemary’s organization, the Consumers for Auto Reliability and Safety, is based in my home district of Sacramento. Rosemary is widely viewed as one of the country’s leading voices on ‘car condition’ issues and on the many challenges facing the used and subprime car market in general. I am confident that Rosemary will provide us with a better understanding on how this subcommittee should move forward to protect and provide safeguards for consumers when they purchase used cars.

“As we know, for a majority of Americans, a car is a necessity. To highlight this fact, a recent study conducted by the U.S. Department of Transportation found that 91 percent of adults commute to work using a personal vehicle. Nowhere is that more evident than in California...as my state is home to the most vehicles of any state in the country.

“Unfortunately, many car buyers have fallen victim to many of the same subprime, predatory lending practices that have caused so many home foreclosures... and our current economic recession.

“California is also home to a great number of cars in poor or unsafe condition. In the aftermath of Hurricanes Katrina and Rita, California received an influx of flood-damaged cars from the Gulf Coast. Many consumers who bought such damaged cars did not know about the cars’ history. This is the case for far too many consumers. It is unacceptable.

“In today’s economic recession, more and more Americans are buying used cars. It is imperative that consumers have full disclosure of their financial terms and the ‘true’ condition of their car.

“I look forward to hearing from today’s witnesses about how we can advance consumer protections that are effective and efficient for car buyers. Thank you again for your leadership on this issue, Mr. Chairman.”

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Ms. MATSUI. Ms. Shahan, what are the parallels between the problems we have been seeing in the mortgage industry and the auto loan financing industry?

Ms. SHAHAN. Thank you very much. There are many parallels between home mortgage lending practices and car lending practices, and one of the biggest things that they have in common is that there is an incentive to get consumers into loans that aren't really in their best interest or don't appropriately reflect their credit worthiness and there is a disparity very often in auto loans between the rate that consumers should get, which is the buy rate for the car, the rate that they actually qualify for based on their credit, versus the rate that they are given because there is a hidden undisclosed charge for the consumer in the form of what is known as the dealer markup and it is very similar to what you seen in home mortgage lending where the brokers have an incentive for raising the interest rate, and the dealers have actually made this a major profit center for them, and part of why it is such a problem for consumers is that it is not disclosed and the Federal Reserve found that even when there is some form of disclosure regarding this, that it is confusing to consumers, it doesn't work. We would like to see it just flat out prohibited because there is a conflict of interest there that consumers don't perceive, and very often they are led to believe that this is the best rate they could qualify for and they are sometimes flat out told we shopped you around for credit and this is the best rate you could get when it is not.

Ms. MATSUI. Well, thank you.

Mr. Van Alst, I understand that some are suggesting that the government create a data collection system to track for auto financing loans. What uses would such a system serve?

Mr. VAL ALST. Numerous uses. One of the problems we have, as Rosemary Shahan pointed out, is that consumers don't realize when this happens to them. They don't know that they are the victim of a consistency between the lender and the dealer, and also those of us that are trying to combat this practice and trying to make sure that minorities aren't especially harmed by this practice by even higher dealer markups, it is very difficult to do that. In fact, I mentioned earlier that NCLC had been involved in some cases regarding this very issue and I would point out, those were the first sort of private enforcement cases regarding disparate impact under the Equal Credit Opportunity Act in 30 years, and the reason we don't see that happen more often is because it is incredibly difficult. You can't just have sort of anecdotal evidence and show that there is a discriminatory impact. You actually have to have statistically significant evidence. In our case, there is over \$1 million up front that people had to put to get all this information together and get it analyzed, and it involved a lot of sort of very tenuous, well not really tenuous but very difficult connections drawing the lines between the loans that were made and then looking at States where there is racial information on driver's licenses and things like that so trying to connect all those points with the information we have presently is almost impossible. As I pointed out, you know, the FTC and the DOJ are certainly charged with enforcing the Equal Credit Opportunity Act and this would be a

tremendous tool for them and for others who are interested in these issues.

Ms. MATSUI. Well, could I also ask you, are there any market-based solutions that can properly address some of these subprime car loans and car condition abuses?

Mr. VAN ALST. There are real efforts. There are some tremendous organizations. Opportunity Cars is sort of an overall blanket organization that has a lot of member organizations that provide cars to low-income folks at reduced and subsidized rates but that is not going to do it if we look at the scale of the problem across the country. Credit unions, the direct loans to their members used to be sort of the credit union's bread and butter, and what we have seen in the past 10 or 20 years is a huge shift where they are now predominantly making these loans indirectly through the dealerships, and these loans are much worse than the direct loans that the credit unions made previously.

Ms. MATSUI. Thank you. I will follow up in my next round. Thank you.

Mr. RUSH. The chair thanks the gentlelady and now recognizes himself for a second round of questioning for 5 minutes and each member who wishes will be given 5 minutes on this second round.

Mr. Van Alst, you highlighted earlier a litany of financing abuses that used car dealerships employ to fleece consumers, yoyo sales, markups, et cetera, et cetera, et cetera. Does empirical evidence show that such predatory practices are widespread and also on the rise, and in your opinion, how has the FTC handled these abuses and what suggestions do you have for mitigating any problems or abuses in the future? I know you might have answered that before but I want to give you a chance to expound on it a little bit.

Mr. VAN ALST. Thank you, Mr. Chairman. It is sort of a multi-part question. I would be happy to try to answer all of those. I think there is, there definitely is empirical evidence as to the disparate impact that these markups have on minorities, and the empirical evidence we have comes primarily from those cases I was mentioning earlier that we were able actually to review hundreds of thousands of these transactions to show what was taking place. Unfortunately, I can't answer whether or not that something that is increasing or anything else about it because that really is information that is not available to people absent one of these very large, difficult sort of litigation efforts and it is not something that you can find out without going through that process. That is one of the real problems, and certainly I think that is one of the reasons that maybe there has not been as much enforcement by the FTC and the DOJ of protections regarding disparate impact is because you can't really get a handle on it without that information. We have got a wonderful tool that the FTC does use the Home Mortgage Disclosure Act looking at issues such as this in the mortgage arena. Unfortunately, they don't have that same tool in the arena of car finance and so while I think that there are failings on the part of regulatory agencies to perhaps enforce some of these laws, it is understandable when it is difficult to track and difficult to really combat these issues with the tools we have available right now.

Mr. RUSH. Ms. Harrington, do you feel as though the Home Mortgage Disclosure Act is a model that could be adapted to disclosing information relative to automobile purchases and discrimination and exploitation in the automobile retail industry?

Ms. HARRINGTON. Mr. Chairman, I don't know what the implications of requiring disclosures by lenders in the car finance area would entail fully. I think that the network of lenders and finance companies involved in auto finance is larger and in many instances operates on a more localized basis than much of the home mortgage financing does. So I can't say with confidence what would be involved in putting a broad disclosure requirement on all entities involved in auto finance the way that the Congress did with the Home Mortgage Disclosure Act. I will absolutely agree with Mr. Van Alst that without the HMDA data, we would have a very difficult time finding evidence, getting the data that we can analyze to determine whether there are Equal Credit Opportunity Act violations in home mortgage lending, and you know, we don't have a good source of data in the auto finance area.

Mr. RUSH. I thank you.

The chair has concluded his questioning. The chair now recognizes the ranking member for an additional 5 minutes.

Mr. RADANOVICH. Thank you, Mr. Chairman.

I have a question again for Mr. Whann, if I might, on the issue of cram down or court-forced lowering of loan principals. If that were to come into effect in the auto industry with the people that you represent, the auto dealers and those wanting to sell cars and nine times out of 10 you have to arrange financing for the people that are buying the cars, if cram down were in effect in the automobile industry, what kind of effect might it have on your auto dealers and if you have an opinion on the banks that provide auto loans as well for the consumers?

Mr. WHANN. Well, speaking on behalf of the auto dealers, you are going to take something essentially a receivable that they are going to collect and it is going to be worth much less stretched out over time and the industry adjusted. Given that this primarily affects not the average used car dealer but somebody in the buy-here, pay-here industry, that would probably upset their business model and it would likely put them out of business. Now, hopefully when they are engaging in these types of loans, you hope the portfolio is—it is your own money that is in the street and based upon the research I have seen in the buy-here, pay-here industry, the average consumer puts down roughly \$1,000 and the average cash in deal for the dealer is somewhere between \$4,000 and \$4,500. So if in fact the dealer who is already paying tax on the income before they receive it so the dealer essentially has an interest-free loan to nobody, they are going to pay tax on the income, and then if in fact somebody for whatever winds up in bankruptcy through no fault of their own or not and the loan is crammed down, that dealer is going to be squeezed on both ends.

Mr. RADANOVICH. In your opinion, do you think banks would be less or more likely to lend if court-ordered cram down was in effect in that industry?

Mr. WHANN. I would say that they are probably less likely but I will tell you, based upon a lot of the testimony I hear today, I

obviously am experiencing something different than maybe some of the other people who are testifying because in the industry that we have with the independent dealer, we are having trouble getting lenders, so our biggest challenge right now is having lenders who will finance a transaction. We don't have finance reserve that is going to be eight points or five points. If there is finance reserve, it is a point and a half or two. We feel very strongly that service contracts are something of value at a fair price because the consumer doesn't have the money to be able to pay for the car if something goes wrong. A gap product may be there. But beyond that, we don't have anything to sell to the consumer. You have the front end of the deal, the profit from the car sale. You have got the back end from the finance and insurance process. Our biggest challenge is getting banks to want to do business, not to work so hard to have a customer come in and get them financed and have them leave to bring them back for some sort of false circumstances. That is not my experience.

Mr. RADANOVICH. I understand. Thank you very much and I yield back, Mr. Chairman.

Mr. RUSH. The chair now recognizes the gentlelady from Ohio, Ms. Sutton, for an additional 5 minutes of questioning.

Ms. SUTTON. Thank you, Mr. Chairman.

Ms. Shahan, in your testimony you note that members of the armed forces are particularly vulnerable to deceptive financing, and I would like to talk a little bit more about that. Mr. Chairman, I would like to enter into the record an American Foreign Press Service article from July of 2000 written by an Army reservist who also works for the FTC. This article details many of the same harmful lending practices we have heard about today and the shameful frequency with which they seem to target military personnel.

[The information follows:]



Buying a Used Car? Get a "Peach," not a "Lemon"

By Donna Miles
Special to American Forces Press Service

WASHINGTON, July 28, 2000 - The 20-year-old Marine couldn't resist the deal advertised in his base newspaper: a free bus ticket from his Washington duty station to Virginia Beach, Va., to buy a used car.

Once the Marine arrived at the dealership, a salesman informed him he'd have to pay for his own trip home if he didn't buy a car. The salesman pressured the Marine into taking out a loan -- at 24 percent interest -- to buy both a car and an extended warranty.

On the trip back to Washington, the Marine's "peach" of a car turned into a "lemon." It started sputtering. When the Marine called the dealer for help, he was told simply to top off the water levels and continue on his way. The car survived the trip, but soon after left the Marine stranded on the roadside. The dealer refused to honor the warranty, claiming the Marine had violated its terms by driving the car when it needed repairs.

Maj. Charles Hale, chief of client services for Marine Corps headquarters legal assistance, said deals involving both new and used cars are among the biggest consumer problems young service members confront. Neither the Defense Department nor the services keep statistics on how many military members buy used cars that turn into lemons as soon as the deal is sealed. But Lt. Col. Walter Skierski, chief of the Air Force Legal Assistance Division, said firsthand experience in Air Force legal assistance offices tells him too many too often.

Skierski said some cars have major mechanical problems the dealer doesn't reveal and the warranty doesn't cover. Some vehicles have no warranties at all, and the buyers aren't told and sometimes don't think to ask. Service members who buy a car "as-is" end up having to pay out of pocket for anything that goes wrong after the sale. Some end up deeply in debt, he said.

"We hear about cases like these constantly," agreed John Meixelle, an attorney-adviser with the Army Legal Assistance Office. "The most unfortunate thing is that the victims are usually junior enlisted members who have bad credit or are trying to establish credit -- and who can least afford to be taken advantage of."

Legal assistance offices often serve as military members' first line of defense against fraudulent used car dealers, helping to resolve disputes between buyers and sellers. And for dealerships that use deceptive practices, commanders are increasingly exercising a powerful right: putting them off limits to service members. "Sometimes the mere threat of that is enough to bring a dealer into compliance," Meixelle said.

The military also is taking steps to help educate service members and their families about their consumer rights when buying used cars or other goods and services. The Navy's preventive law program, for example, uses commanders' briefings, brochures and base newspaper articles to inform sailors and their families about frauds they're likely to encounter -- including fraudulent used car deals, explained Cmdr. Ann DeLaney, deputy assistant judge advocate general for legal assistance.

Federal Trade Commission attorney Steve Baker suggested consumers kick the tires, try out the radio and go for a test drive when buying a used car. But, he said, many don't look for what he calls the most important thing in a used car, truck or van: the buyers guide.

By law, all dealers must post a buyers guide inside each used

vehicle for sale. It spells out in writing what warranty coverage, if any, consumers are getting for their money. It lists the major mechanical and electrical systems on the vehicle, including some of the major problems consumers should look out for. It also tells them whom to contact at the dealership if there's a problem after they buy.

Yet, Baker said, many consumers don't know to look for the guide, and an alarming number of dealers don't post them.

The FTC recently inspected used car dealers on Chicago's North Shore, just outside the gates of Great Lakes Naval Training Center, and found that more than one-third of the 14 used car dealers surveyed didn't comply with the law. Almost one-fourth of the cars on their lots had no buyers guides, and many of the posted guides were incomplete or inaccurate. The noncomplying dealers will be fined by the state and could face prosecution by the FTC for future violations.

Baker acknowledged that the compliance rates weren't the worst he's seen nationwide. "But what's particularly disturbing," he says, "is that the dealers are located in an areas where the consumers, such as new military trainees, may not understand their rights to this information." To help protect this population, he said, the FTC plans to conduct more inspections of used car dealers near other major military bases.

Baker said used car dealers who don't display buyers guides send consumers an important message. "Not displaying the Buyers Guide shows a blatant disregard for the law and for their customers," he said. "If the dealer isn't giving them the information they're entitled to, consumers should take their business elsewhere -- to a dealer who will."

He suggested used car shoppers take another important step before shelling out. "Get the vehicle inspected by an independent mechanic that you've hired yourself before you buy," Baker said. "It will cost you a few dollars, but could save you a lot of money in the long run."

The FTC offers additional tips to help protect consumers from ending up with a lemon

- o Check out the vehicle's repair record, maintenance costs and safety and mileage ratings in consumer magazines or online. Look up the vehicle's "blue book" value and be prepared to negotiate the price
- o Ask for the maintenance record from the owner, dealer or repair shop
- o Test drive the vehicle on hills, highways and in stop-and-go traffic
- o Get all promises in writing. Oral promises are worthless
- o Ask to see a copy of the dealer's warranty before you buy
- o Check out the dealer with local consumer protection officials
- o Recognize that warranties are included in the price of the car, service contracts cost extra and are sold separately
- o Avoid buying a vehicle "as is." The dealer has no responsibility for making repairs after the purchase, even if the engine falls out as you're driving off the lot
- o Use extra caution when buying a used car privately, because no buyers guide is required
- o Consider using the Internet to research the vehicle's title history. For a small fee, you can use a service to help determine, for example, if the vehicle's odometer was rolled back.

"There's no way to absolutely guarantee that a service member's used car experience is going to be positive," Baker said. "But by taking steps to protect themselves, and getting educated about their rights in the marketplace, young service members can help avoid the potential pitfalls."

(Donna Miles works for the Federal Trade Commission and also has written frequently for the American Forces Press Service while on duty with the Army Reserve.)

Ms. SUTTON. Ms. Shahan, based on your testimony, it appears that little has changed in the 9 years since the article was written. Can you explain why car dealerships or how car dealerships are targeting military personnel? What makes these individuals particularly vulnerable to yoyo financing and other practices?

Ms. SHAHAN. Yes. Thank you for asking. This is a problem that is really near and dear to my heart. I was married to a Navy JAG for 20 years and it is actually why I got involved in working on auto issues instead of being a college English teacher. I had a personal experience, and the reality is that when you are in the military a lot of times you are young, you are away from home for the first time. This is the first time you get a major paycheck. You are on your own and you are also vulnerable because a lot of times you have a security clearance that dealers will threaten and they will say we, you know, put you into this car, the financing didn't go through, we want you to come back and sign another contract on worse terms, sometimes a bigger down payment, higher interest rate or both, and if you don't agree to this, then they will say to you, we will report you to your command and we will make you lose your security clearance, and this is a serious problem for our troops. When there was a hearing in California before an assembly committee, members of the armed forces came and testified regarding financial readiness issues in our State where more troops are deployed than from any other State. More are stationed in our State and deploy from California than anywhere else. And it is a disgrace that they are being treated the way they are and that there aren't better protections there for them. And they testified that yoyo financing is one of the worst problems that our troops encounter, that auto sales are the single worst financial readiness problem that they encounter. The Navy Relief Society and others also back that up with their testimony.

Ms. SUTTON. Can you explain what financial readiness means?

Ms. SHAHAN. It means that the troops are expected to keep their financial house in order in order to be ready to serve our Nation, and we have an obligation to them obviously to protect them while they are protecting us, and we have situations like in Arizona at Fort Wachua in Tucson where the fort actually had to resort to determining some dealers were off limits because they were preying on the troops. In every military base in the United States, there are rings of payday lenders and schlocky car dealers and, you know, it is a really serious problem that affects morale and readiness and their ability to accomplish their mission.

Ms. SUTTON. I thank you for that answer, and if I could just, Ms. Harrington, I sort of see you weighing in. Can you tell me, I mean, I know that the FTC has a military sentinel program that is supposed to help members of the armed forces and their families who are facing financial problems even as they serve our Nation. What actions is the FTC taking against auto dealers for these kinds of scamming practices?

Ms. HARRINGTON. Most recently we have gone after payday lenders, which as Rosemary indicated also ring bases. We get very few complaints about car dealers and car finance. We got 1.2 million consumer complaints last year, and 2,400 of them were about car financing. I would venture to say probably none of them or few of

them came from military members. They don't complain. We have been out trying to encourage the service offices on bases to please get the complaints to us. We send our regional staffs out to work on military installations, both on education but also again to encourage complaints, but we don't get them, and I think some of the reasons are ones that Rosemary mentioned, that sometimes there is a culture of not complaining and not coming forward, and, you know, I know you know from your experience legislating in other issues that getting people to come forward when they are victims, when there is a culture that discourages that is really a challenge.

Ms. SUTTON. Well, I appreciate that. The reality though is of course I am coming forward on their behalf, and the fact that the Judge Advocate General stated that auto purchasing is the single worst financial readiness problem facing troops in California and we know it is probably not isolated there, we need to find a way to address this in a more effective manner. Thank you.

Mr. RUSH. The chair now recognizes the gentleman from Florida for 5 minutes of additional questioning.

Mr. STEARNS. Thank you, Mr. Chairman.

Just to start off, this question is for Misters Burch, Whann and Waldron. It may be just a commentary on NMVTIS. As I understand, NMVTIS, which was enacted or created in 1992 as an Anti-Car Theft Act, right now it does not specifically track damaged vehicles that have had airbags deployed, and as I understand it, it does not cover individuals who are self-insured owners that are required to provide information to NMVTIS, and I guess the question is, in the overall scheme of things, title washing and other acts of fraud, is there a better way of doing it, perhaps through NHTSA, than NMVTIS? This might just be a general question. Mr. Burch?

Mr. BURCH. Thank you, Congressman. I think we are working diligently to analyze now where the gaps are in the information that we are preparing to collect but I think in looking at where we are headed and looking at what the rule allows us to do, we know that there are some gaps now but we expect that by January 1, 2010, when we have all States on board, we have all junk, salvage and insurance carriers reporting to the system and we include certain self-insured entities will also be required to report. You are correct in that we don't have—

Mr. STEARNS. You don't have title washing now, right?

Mr. BURCH. I am sorry, sir?

Mr. STEARNS. You don't have title washing? You don't keep track of title washing and other acts of fraud?

Mr. BURCH. The system does address title washing, and Title II of the Anti-Car Theft Act I think focused on preventing fraud and in particular this issue of brand washing or title washing and so that is something that the system is currently protecting against, and as we get additional States on board and additional providers sharing information, we will address that issue even more comprehensively than we do today. You are correct in that we don't collect damage estimates. We do collect total-loss determinations, so if an insurance carrier makes a total-loss determination or if a State titles a vehicle as salvage, we will have that information in NMVTIS.

Mr. STEARNS. OK, but you don't have it now.

Mr. Whann?

Mr. WHANN. Unfortunately, we face many of the same issues today that we faced back when the Anti-Car Theft Act was enacted. I think back to when Dick Morris convened the advisory group after the passage of that, and when myself and Gary Dickinson did an educational session for them on titling and title washing and we had the same problem then that we have today.

Mr. STEARNS. And here we are 17 years later and we are still talking about it.

Mr. WHANN. Exactly. We still have—I think it is probably safe to assume we are not going to have a national title so if we are not going to have a national title because we have 50 different ways of doing this, what we have to make sure we do is that we capture title brands and that we carry them forward State to State, because if we don't do that, the system is only as good as the information in there. Self-insured information needs to be tracked, and of course, any safety item is critical. We can debate what is frame damage on a unibody car but we know when an airbag has been deployed. If that could be tracked and passed on, we can make sure it has been repaired properly.

Mr. STEARNS. Mr. Waldron.

Mr. WALDRON. We actually do have that title and registration information across all of the 50 States and have had it for a number of years, and within that data we do track for title washing, and one of the things that we do is that we have all 50 States and we have a giant grid of every brand in every State, understand how those work, you know, and which one is what and those brands once they are put on the vehicle will always carry with the vehicle in our Auto Check Vehicle History Report, so they carry across today. So we do do that. We do not have all of the total-loss information as we spoke of earlier so that obviously would be a big help if that comes in the commercial realm and we also have many, many accidents. I do not claim that we have 100 percent of the accidents in the United States. No one has that. But we have a significant number of the important or major accidents in the United States across all of the different States that we pick up from many sources, government and non-government, and we report those and those always stay with the history of the vehicle. So that is why we think it is so important to look at something in a comprehensive basis. We do have that today but we do not have in the NMVTIS is real time going back and forth. Sometimes that data is today, sometimes it is a day ago or up to like a week ago but we do have data from every single State.

Mr. STEARNS. Mr. Chairman, is this the second round of questions?

Mr. RUSH. This is the second round.

Mr. STEARNS. Is it possible I could have additional time since I only asked one? Could you give me an additional 3 minutes?

Mr. RUSH. No, I won't give you 3 minutes. The Chair will give you an additional minute for another question and I will offer that to any other member who wishes to take advantage of it. The witnesses have been here for a while now.

Mr. STEARNS. This is for Mr. Waldron. There is a lot of talk about the importance of total-loss disclosure for buyers. What happens to a shopper when he is just coming across a car? Should this information be available to the shopper before even getting to the buying process?

Mr. WALDRON. We think that is very important. There was a lot of conversation today about when somebody is actually buying the vehicle and you are fairly far down the path when you are looking at that. What we talk about with Auto Check is that you can use this thing in the shopping mode. You can buy an unlimited number of reports for \$25 and use it for 60 days to look at as many vehicles as you want to look at and therefore you can sort out vehicles that have title problems or other issues that you find unacceptable while you are in the shopping process. We think that is absolutely critical.

Mr. STEARNS. Yes, because lots of people would be in the buying stage if they saw this information when they were shopping.

Mr. WALDRON. Correct, and that is why we offer it in the way that we do and we also, we want to shift the cost burden as much as we can to the retail channel to the dealers as part of what they do and it makes sense, and dealers buy from us oftentimes all the reports on all their vehicles, expose them all the time, both online and in the dealership, and one of the things we say to consumers is, if the dealer won't give you one of our vehicle history reports, walk or run away.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. RUSH. Thank you. The chair now recognizes Ms. Sutton for an additional minute of questioning.

Ms. SUTTON. Thank you, Mr. Chairman.

I would just like to give Mr. Van Alst a chance. In your statement you touched briefly on the cumbersome rulemaking process at the FTC. Do you want to just take a moment and elaborate on that?

Mr. VAN ALST. Yes, there is and certainly as we have heard today, the current process which the FTC has to use to do a rulemaking is difficult and cumbersome and time consuming, and we would certainly not oppose, you know, a regular APA rulemaking for the FTC. However, I think if that were to be the case, there would certainly come with that ability to have such a rulemaking the responsibility to use that rulemaking effectively and to try to go ahead and move on these issues that we recognize have been with us for years and years and we haven't really effectively ended yet. So while we certainly think that that rulemaking would be helpful, we would like to make sure that that rulemaking is used effectively and really combats some of these practices we have discussed today.

Ms. SUTTON. Thank you.

Mr. RUSH. The chair really thanks the witnesses for your invaluable testimony here. You have been a superb group of witnesses and again, we are sorely indebted to you for your time and participation. And we want to just note that the members will be given additional time to submit written questions, and please be prepared to answer these questions should you receive them.

So we again want to thank you so much for your time, and this committee now stands adjourned.

[Whereupon, at 1:00 p.m., the subcommittee was adjourned.]
[Material submitted for inclusion in the record follows:]

Statement of
Representative John D. Dingell
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on "Consumer Protection in the Used and Subprime Car Market"

March 5, 2009

Thank you, Mr. Chairman, for holding today's hearing. As a result of the Nation's grave recession, the Congress has focused much attention on deceptive lending practices in the housing market. Such scrutiny should also extend to unfair practices in the market for used vehicles, particularly when it comes to low-income consumers and those with below-average credit ratings. For many working class Americans, who do not own their homes, cars are their single largest assets. Now more than ever, these people should enjoy robust consumer protections in the automobile market, especially as their cars are oftentimes the only means by which they can travel to and from work.

In my view, the Congress must address two areas of concern while considering legislation to prevent abuses in the used car market. First, we must ensure that consumers have adequate access to the title histories of the cars they wish to purchase. The National Motor Vehicle Title Information System (NMVTIS) is a good starting point, but the checkered history of its long-delayed implementation indicates that better cooperation between state and federal agencies is urgently required. Moreover, we must consider more conventional methods by which to make car title information available to consumers, so that those without access to the Internet are not in turn denied equal access to essential consumer information otherwise available electronically.

Second, we must examine deceptive lending practices, such as exorbitant fees included in loans for document processing and yo-yo lending. We should consider the merits of prohibiting these disgraceful practices, as well as strengthening the ability of the Federal Trade Commission to enforce penalties for such consumer abuses.

I offer my cooperation in this worthy endeavor, Mr. Chairman, and look forward to crafting sensible legislation to prevent unfair and deceptive practices in the used car market.



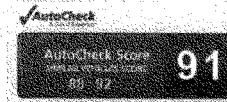
Your AutoCheck Vehicle History Report

2002 Ford Thunderbird

Report Run Date: 2009-03-03 08:26:06.537 EST

VIN: 1FAHP60A62Y116405
 Year: 2002
 Make: Ford
 Model: Thunderbird
 Style/Body: Convertible 2D
 Class: Sport Car - Premium
 Engine: 3.9L V8 EFI / SFI
 Country of Assembly: United States
 Vehicle Age: 7 year(s)
 Calculated Owners: 3
 Last Reported: 17,079
 Odometer Reading:

This vehicle's AutoCheck Score



The AutoCheck Score is a summary of your vehicle's history, letting you compare vehicles with ease.

This vehicle qualifies for Buyback Protection



Safeguard your investment with AutoCheck Buyback Protection, which reduces the risk in buying a used vehicle.

Section summaries

The vehicle identification number you submitted has been analyzed and summary information on your car is shown below.

Title and ProblemCheck:

Your vehicle checks out!

OdometerCheck:

Your vehicle checks out!

Vehicle Use and EventCheck:

Specific vehicle use(s) or events reported

Full History:

Detailed information available

Title and ProblemCheck



Your Vehicle Checks Out! AutoCheck's database for this 2002 Ford Thunderbird (1FAHP60A62Y116405) shows no negative titles or other problems. When reported to AutoCheck, these events can indicate serious past damage or other significant problems.

0 Problem(s) 15 Title/Problem areas checked:
Reported:

- No abandoned title record
- No damaged title or major damage incident record
- No fire damaged title record
- No grey market title record
- No hail damage title record
- No insurance loss title record
- No junk or scrapped title record
- No manufacturer buyback/lemon title record
- No odometer problem title record
- No rebuilt/rebuildable title record
- No salvage title or salvage auction record
- No water damaged title record
- No NHTSA crash test record
- No frame/unibody damage record
- No recycling facility record

OdometerCheck



Your Vehicle Checks Out! AutoCheck examined the reported odometer readings reported to AutoCheck for this 2002 Ford Thunderbird (1FAHP60A62Y116405) and no indication of an odometer rollback or tampering was found. AutoCheck uses business rules to determine if reported odometer readings are significantly less than previously reported values. Not all reported odometer readings are used. Title and auction events also report odometer tampering or breakage.

0 Problem(s) Mileage Date Reported
Reported:

	Mileage	Date Reported
<input checked="" type="checkbox"/>	7	05/09/2002
<input checked="" type="checkbox"/>	20	06/14/2002
<input checked="" type="checkbox"/>	10,574	09/13/2005
<input checked="" type="checkbox"/>	13,380	06/07/2006

<input checked="" type="checkbox"/>	13,944	07/10/2006	not included in rollback calculation
<input checked="" type="checkbox"/>	13,918	08/31/2006	
<input checked="" type="checkbox"/>	15,831	05/10/2007	
<input checked="" type="checkbox"/>	15,827	05/11/2007	not included in rollback calculation
<input checked="" type="checkbox"/>	15,831	05/11/2007	
<input checked="" type="checkbox"/>	17,079	12/28/2007	

Vehicle Use and EventCheck



Information Reported! AutoCheck shows additional information reported to AutoCheck about how this 2002 Ford Thunderbird (1FAHP60A62Y116405) has been used and other events. This includes reported accidents and corrected or duplicate titles and storm area registrations.

1 Event(s) 6 Vehicle uses checked:
Reported:

- Fleet, rental and/or lease use record(s)
- No taxi use record
- No police use record
- No government use record
- No livery use record
- No driver education record

2 Event(s) Reported: 9 Vehicle events checked:

- No accident record reported through state agencies or independent sources
- No corrected title record
- No duplicate title record
- Emission/safety inspection record(s)
- Loan/Lien record(s)
- No fire damage incident record
- No repossessed record
- No theft record
- No storm area registration/title record

Full History

Below are the historical events for this vehicle listed in chronological order. Any discrepancies will be in bold text.

Report Run Date 2009-03-03 08:26:537 EST

Vehicle: 2002 Ford Thunderbird (1FAHP60A62Y116405)

Event date	Location	Odometer reading	Data Source	Details
04/27/2002	NY		Independent Source	VEHICLE MANUFACTURED AND SHIPPED TO DEALER
05/09/2002	NY	7	Motor Vehicle Dept.	PASSED SAFETY INSPECTION
05/11/2002	LAKE GROVE, NY		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL
06/14/2002	NY	20	Motor Vehicle Dept.	TITLE(Lien Reported)
04/17/2004	LAKE GROVE, NY		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL
09/13/2005	NY	10,574	Motor Vehicle Dept.	PASSED EMISSION INSPECTION PASSED SAFETY INSPECTION
03/25/2006	LAKE GROVE, NY		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL
06/07/2006	NY	13,380	Auto Auction	REPORTED AT AUTO AUCTION
07/10/2006	WILLISTON PARK, NY		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL
07/10/2006	NY	13,944	Motor Vehicle Dept.	PASSED EMISSION INSPECTION PASSED SAFETY INSPECTION
08/31/2006	WILLISTON PARK, NY	13,918	Motor Vehicle Dept.	TITLE(Lien Reported)
05/10/2007	PA	15,831	Auto Auction	REPORTED AT AUTO AUCTION
05/11/2007	MANHEIM, PA	15,827	Motor Vehicle Dept.	TITLE (Title #:64600644)
05/11/2007	PA	15,831	Auto Auction	AUCTION ANNOUNCED AS FLEET/LEASE
12/28/2007	LANDENBERG, PA	17,079	Motor Vehicle Dept.	TITLE (Title #:64600644) REGISTRATION EVENT/RENEWAL
01/30/2008	LANDENBERG, PA		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL
01/27/2009	LANDENBERG, PA		Motor Vehicle Dept.	REGISTRATION EVENT/RENEWAL

This Vehicle's Glossary

Below are the specific definitions for events that appear in this vehicle's report.

More information is available in the full AutoCheck glossary.

Term	Section Location	Definition
Emission/Safety Inspection	Vehicle Use and EventCheck	An approved emission testing station has inspected the vehicle to measure the amount of pollutants the vehicle emits into the environment.
Loan/Lien	Vehicle Use and EventCheck	

Term	Section Location	Definition
		A loan/lien is the legal right to take and hold or sell the vehicle of a debtor as security or payment for a debt. Normally, a vehicle will have a lien due to a loan or unpaid repair bill against the vehicle.
Fleet, Rental and/or Lease Use	Vehicle Use and Lease Use EventCheck	The vehicle has been reported as used as a fleet, rental, and/or lease vehicle.

AutoCheck Terms and Conditions

This report, and any reliance upon it, is subject to AutoCheck Terms and Conditions. If you obtained the report from a dealer, the dealer has been provided with these Terms & Conditions and can share them with you. These AutoCheck Terms and Conditions are also available at any time at www.autocheck.com/terms or by writing to Experian: Experian Automotive C/O AutoCheck Customer Service 955 American Lane Schaumburg IL 60173

Buyback Protection Terms and Conditions

This vehicle (1FAHP60A62Y115405) qualifies for AutoCheck Buyback Protection. If you obtained the report from a dealer, the dealer has been provided with the terms and can share them with you. These Buyback Protection Terms and Conditions are also available to you at any time at www.autocheck.com/bbptersms or by writing to Experian: Experian Automotive C/O AutoCheck Customer Service 955 American Lane Schaumburg IL 60173

About AutoCheck

AutoCheck vehicle history reports by Experian Automotive is the leading vehicle history reporting service. With expert data handling, the Experian Automotive database houses over 4 billion records on a half a billion vehicles. Every AutoCheck vehicle history report will give you confidence when buying or selling your next used vehicle, with superior customer service every step of the way.



Your AutoCheck Vehicle History Report

2000 Lexus RX300

Report Run Date: 2009-03-03 08:30:54.738 EST

VIN: JT6GF10U2Y0058328
 Year: 2000
 Make: Lexus
 Model: RX300
 Style/Body: SUV / Utility 4D
 Class: CUV - Premium
 Engine: 3.0L V6 EFI
 Country of Assembly: Japan
 Vehicle Age: 9 year(s)
 Calculated Owners: 8
 Last Reported: 01/18/09
 Odometer Reading: 91,185

This vehicle's AutoCheck Score



The AutoCheck Score is a summary of your vehicle's history, letting you compare vehicles with ease.

This vehicle does not qualify for Buyback Protection



Unfortunately, this vehicle does not qualify for our Buyback Protection program.

Section summaries

The vehicle identification number you submitted has been analyzed and summary information on your car is shown below

Title and ProblemCheck:

- Major title or other problem(s) reported

OdometerCheck:

- Your vehicle checks out!

Vehicle Use and EventCheck:

- Specific vehicle use(s) or events reported

Full History:

- Detailed information available

Title and ProblemCheck



Problem Reported! AutoCheck's database for this 2000 Lexus RX300 (JT6GF10U2Y0058328) shows a negative title(s) or other problems. When reported to AutoCheck, these events can indicate serious past damage or other significant problems.

3 Problem(s) 15 Title/Problem areas checked:
Reported:

- No abandoned title record
- No damaged title or major damage incident record
- No fire damaged title record
- No grey market title record
- No hail damage title record
- No insurance loss title record
- Junk or scrapped title record(s)
- No manufacturer buyback/lemon title record
- No odometer problem title record
- Rebuilt/rebuildable title record(s)
- Salvage title or salvage auction record(s)
- No water damaged title record
- No NHTSA crash test record
- No frame/unibody damage record
- No recycling facility record

OdometerCheck



Your Vehicle Checks Out! AutoCheck examined the reported odometer readings reported to AutoCheck for this 2000 Lexus RX300 (JT6GF10U2Y0058328) and no indication of an odometer rollback or tampering was found. AutoCheck uses business rules to determine if reported odometer readings are significantly less than previously reported values. Not all reported odometer readings are used. Title and auction events also report odometer tampering or breakage.

0 Problem(s) Mileage Date Reported
Reported:

	Mileage	Date Reported
<input checked="" type="radio"/>	10	02/24/2000
<input checked="" type="radio"/>	14,477	01/04/2001
<input checked="" type="radio"/>	24,085	09/06/2001
<input checked="" type="radio"/>	43,597	03/18/2003

<input checked="" type="radio"/>	48,095	04/26/2004
<input checked="" type="radio"/>	48,766	07/26/2004
<input checked="" type="radio"/>	48,766	08/09/2004
<input checked="" type="radio"/>	50,000	11/08/2005
<input checked="" type="radio"/>	59,000	01/27/2006
<input checked="" type="radio"/>	91,185	10/20/2006

Vehicle Use and EventCheck



Information Reported! AutoCheck shows additional information reported to AutoCheck about how this 2000 Lexus RX300 (JT6GF10U2Y0058328) has been used and other events. This includes reported accidents and corrected or duplicate titles and storm area registrations.

0 Event(s) 6 Vehicle uses checked:
Reported:

- No fleet, rental and/or lease use record
- No taxi use record
- No police use record
- No government use record
- No livery use record
- No driver education record

1 Event(s) Reported: 9 Vehicle events checked:

- No accident record reported through state agencies or independent sources
- No corrected title record
- No duplicate title record
- No emission/safety inspection record
- Loan/Lien record(s)
- No fire damage incident record
- No repossessed record
- No theft record
- No storm area registration/title record

Full History

Below are the historical events for this vehicle listed in chronological order. Any discrepancies will be in bold text.

Report Run Date 2009-03-03 08:30:54.738 EST

Vehicle: 2000 Lexus RX300 (JT6GF10U2Y0058328)

Event date	Location	Odometer reading	Data Source	Details
02/24/2000	BATON ROUGE, LA	10	Motor Vehicle	TITLE (Title #:A3854938) Dept.
02/24/2000	BATON ROUGE, LA		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
01/04/2001	BATON ROUGE, LA	14,477	Motor Vehicle	TITLE (Title #:K0764204)(Lien Reported) Dept. REGISTRATION EVENT/RENEWAL
08/28/2001	SAN ANTONIO, TX		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
09/08/2001	SAN ANTONIO, TX	24,085	Motor Vehicle	TITLE (Title #:01521637129115140) Dept.
08/01/2002	SAN ANTONIO, TX		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
03/18/2003	BOERNE, TX	43,597	Motor Vehicle	TITLE (Title #:13020037689120424) Dept.
08/01/2003	SAN ANTONIO, TX		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
04/26/2004	BOERNE, TX	48,095	Motor Vehicle	TITLE (Title #:13030138091104057) Dept.
07/26/2004	SAN ANTONIO, TX	48,766	Motor Vehicle	TITLE (Title #:29722038192150035) Dept. JUNK VEHICLE SALVAGE
08/09/2004	SAN ANTONIO, TX	48,766	Salvage Auction	SOLD AT SALVAGE AUCTION / Salvage CERTIFICATE REPORTED FRONT IMPACT REPORTED
09/21/2004	NEW CASTLE, DE		Motor Vehicle	TITLE (Title #:U0559444) Dept. RECONSTRUCTED
09/24/2004	TRENTON, NJ		Motor Vehicle	TITLE (Title #:V3200426800000160) Dept. SALVAGE
12/17/2004	TOBYHANNA, PA		Motor Vehicle	TITLE (Title #:61273086) Dept. REGISTRATION EVENT/RENEWAL
11/08/2005	TOBYHANNA, PA	50,000	Motor Vehicle	TITLE (Title #:61273086) Dept.
11/18/2005	TOBYHANNA, PA		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
01/27/2006	TOBYHANNA, PA	59,000	Motor Vehicle	TITLE (Title #:61273086) Dept.
02/01/2006	TOBYHANNA, PA		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.
10/20/2006	CENTRAL ISLIP, NY	91,185	Motor Vehicle	TITLE Dept.
11/01/2006	FARMINGVILLE, NY		Motor Vehicle	REGISTRATION EVENT/RENEWAL Dept.

This Vehicle's Glossary

Below are the specific definitions for events that appear in this vehicle's report.

More information is available in the full AutoCheck glossary.

Term	Section Location	Definition
Junk	Title and ProblemCheck	The vehicle's parts have been salvaged for reuse and the remainder of the vehicle has been destroyed or scrapped. This vehicle has been declared a total loss, is not road worthy and should not be titled again for use on the road.
Salvage	Title and ProblemCheck	A salvage vehicle is a vehicle that has been wrecked or damaged beyond repair; declared a total loss by the insurer; or declared a total loss by reason of theft. When an insurance company as a result of a total loss settlement acquires a vehicle, the insurance company must apply for a Salvage Certificate. If the owner retains possession of a salvage vehicle, the owner must obtain a Salvage Certificate before receiving a total loss statement from the insurance company.
Rebuilt/Rebuildable	Title and ProblemCheck	The vehicle was a salvaged vehicle that was refurbished with new or used parts. An affidavit of repair from the rebuilder or individual making the repairs, stating what repairs were made to the vehicle and that the vehicle is now rebuilt and road operable, may be required to obtain a rebuilt/rebuildable title. These vehicles must also pass a state safety inspection before being allowed back on the road.
Loan/Lien	Vehicle Use and EventCheck	A loan/lien is the legal right to take and hold or sell the vehicle of a debtor as security or payment for a debt. Normally, a vehicle will have a lien due to a loan or unpaid repair bill against the vehicle.

AutoCheck Terms and Conditions

This report, and any reliance upon it, is subject to AutoCheck Terms and Conditions. If you obtained the report from a dealer, the dealer has been provided with these Terms & Conditions and can share them with you. These AutoCheck Terms and Conditions are also available at any time at www.autocheck.com/terms or by writing to Experian: Experian Automotive C/O AutoCheck Customer Service 955 American Lane Schaumburg IL 60173

Buyback Protection Terms and Conditions

This vehicle (JTG10U2Y0058328) does not qualify for AutoCheck Buyback Protection.

About AutoCheck

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NATIONAL AUTOMOBILE DEALERS ASSOCIATION
 Office of Legislative Affairs
 412 First Street, S.E. • Washington, D.C. • 20003
 202 • 547 • 5500

The National Automobile Dealers Association (NADA) represents nearly 20,000 franchised automobile and truck dealers, both domestic and international, who sell new and used motor vehicles, and engage in service, repair, and parts sales. Together our members employ over 1 million people nationwide. NADA is pleased to submit written comments for the Commerce, Trade, and Consumer Protection Subcommittee hearing "Consumer Protection in the Used and Subprime Car Market" on March 5, 2009.

The following comments will address:

- 1) NADA supports the National Motor Vehicle Title Information System (NMVTIS)
- 2) NMVTIS Still Has Limitations and Must be Supplemented with Federal Legislation
- 3) Total Loss Disclosure is Far Superior to a Window Sticker Concept
- 4) Understanding Dealer Assisted Financing

NADA Supports the National Motor Vehicle Title Information System (NMVTIS)

For over a decade, NADA has championed efforts to better track severely damaged vehicles and worked for enactment of legislation and rulemaking to establish the National Motor Vehicle Title Information System (NMVTIS) to connect all state DMVs to combat title fraud.¹

NADA believes the NMVTIS system is a critical, but still incomplete, tool to detect auto salvage fraud. NADA strongly supports the Justice Department's recent rule that establishes NMVTIS and requires insurance and salvage yards to report totaled vehicles.²

NADA also seeks to modernize the NMVTIS rule, which is based on a 17-year-old law.
 The following limitations of NMVTIS pose important loopholes that can be addressed with federal legislation: 1) fourteen states are still not participating with NMVTIS [See supplemental document: "NMVTIS Participation"], and full participation is necessary for complete and accurate information; 2) delayed insurance and salvage reporting of totaled vehicles still allows for some totaled vehicles to escape disclosure; 3) the scope of total

¹ For example, in a May 20, 2008 letter to then Attorney General Michael Mukasey, NADA, consumer protection organizations, law enforcement, and auto industry representatives strongly urged that the Justice Department make the NMVTIS rulemaking a priority by finalizing the necessary regulations to implement the insurance and salvage yard VIN disclosure requirements under the Anti-Car Theft Act as soon as possible.

² NMVTIS mandated by Congress in the "Anti Car Theft Act of 1992" (Public Law 102-519) and "Anti Car Theft Improvements Act of 1996" (Public Law No. 104-152), which assigned responsibility for implementing NMVTIS to the U.S. Department of Justice (DOJ).

loss information must be expanded to cover more vehicles and more safety information; 4) the wholesale used car market needs commercial access to alert consumers to stay away from severely damaged vehicles; and 5) DMV information must be integrated with other sources of vehicle history information to streamline information to make it more efficient and accessible to the public.

The goal of our federal legislative efforts to combat title fraud is to create more public transparency of totaled vehicles by:

- Improving timeliness and completeness of the total loss vehicle data;
- Expanding access for consumers; and
- Supplementing NMVTIS with more modern technology that allows total loss data to be readily available in an electronic format, with commercial access.

NMVTIS Is a Critical Tool to Detect Auto Salvage Fraud

First, the Justice Department deserves significant credit for writing a strong rule to connect all state departments of motor vehicles (DMVs) to make theft and salvage brand information available to the public. NMVTIS has three major benefits: 1) NMVTIS will help identify salvage brands from other states and carry forward brands; 2) NMVTIS will help eliminate duplicate titles, and; 3) The new rules will help identify more totaled vehicles such as insurance-designated vehicles and owner-retained vehicles.

Background

Each year, several million vehicles are totaled and thousands of wrecked, flooded, or stolen vehicles are sold without proper disclosure. Many totaled vehicles are resold at salvage auctions, rebuilt, and reenter the market with a clean vehicle title. Consumers suffer because the state DMV system of paper titles does not provide a timely or complete vehicle history. The current system for tracking totaled and salvaged vehicles is outdated and full of loopholes.

To help combat this national problem, NMVTIS was developed to provide an electronic means for verifying and exchanging title, brand, and theft data among state motor vehicle administrators, law enforcement officials, consumers, and insurance carriers.

Salvage "branded" titles are generally issued when a vehicle is damaged to the extent that the repair cost of the vehicle exceeds about 75 percent of its pre-damage value. But because the terms for damage and damage thresholds vary by state, vehicle disclosure laws in the states are inconsistent and incomplete. Therefore, unscrupulous sellers have been able to easily "wash" paper titles and hide a salvage history by issuing titles outside the state. For example, in just the first half of 2008, according to Experian Automotive,

185,000 branded titles were transferred to other states and were then re-registered with "clean" titles, which amount to fifteen percent of all re-titled vehicles.³

In addition, since salvage brands vary from state to state, many total loss motor vehicles do not fall under a designated salvage or junk definition, and thus never receive a salvage or junk title. An example of this is flood vehicles, as "flood" brands do not exist under some state laws. As a result, many severely flood-damaged vehicles are never reported as such, even if a vehicle's damage would qualify under the laws of another state that the vehicle is later registered in.

NMVTIS Benefits

NMVTIS will help identify and carry forward salvage brands from other states. States will be required to check NMVTIS for other states' title brands before issuing a new title, rather than relying on paper titles to detect the removal or alteration of title brands. NMVTIS performs a valuable service by allowing state titling agencies verify information on *brands* applied to motor vehicle titles, rather than trying to standardize the inconsistencies between states. Making the process of checking title brands between states makes it more likely that interested parties can learn if a motor vehicle was previously wrecked, flooded or stolen.

NMVTIS will also help eliminate duplicate titles, by allowing title clerks to determine the validity and status of titles and odometer information reported in the system. Allowing title clerks to have more accurate VIN and odometer information will make it easier to deter the most egregious forms of vehicle fraud, such as VIN cloning and odometer rollbacks.

The new NMVTIS also requires insurance carriers to report on the acquisition of junk and salvage motor vehicles. Since total loss declarations vary by carrier, a major loophole has been nondisclosure of vehicles that have been totaled by the insurance company, but not considered a salvage or junk vehicle under state law. Insurers have not been required to electronically disclose the VINs of all totaled vehicles for the public. As a result of the NMVTIS rule, beginning March 31, auto insurers have to report both vehicles found to be a total loss under applicable state laws, and vehicles designated as "total losses" by its own policies on a prospective basis.

The rule also closes the owner-retained vehicle loophole. Previously, insurance companies were not necessarily required to report vehicles they declared as total losses, if they were retained by the owner. In some states, the vehicle owner was also not required to notify the state DMV under state law. Because of these loopholes, the vehicle's salvage history would not be recorded by any DMV or vehicle history database. Despite the insurers' protests⁴, the DOJ clarified the rule to eliminate the concept of possession, with the trigger

³ Reuters, "Experian's AutoCheck Finds More Than 185,000 Damaged Vehicles Re-titled as Clean", August 25, 2008.

⁴ FBI Docket No. 117; AG Order No. 3000-2008, RIN 1110-AA30, comments of the American Insurance Association, National Association of Mutual Insurance Companies, National Insurance Crime Bureau, and Property Casualty Insurers Association of America, November 21, 2008.

instead simply a declaration of a "total loss" by the insurance company or a requirement to declare a vehicle a "salvage vehicle".

NMVTIS Still Has Limitations and Must be Supplemented with Federal Legislation

Since the 102nd Congress, NADA has worked with Congress and other stakeholders to craft a federal legislative solution to the problems stemming from the complex title fraud problem. Each year, new car dealers resell almost 20 million used cars either in retail to consumers or through the wholesale market. Despite new car dealers taking precautions to avoid taking problem vehicles into inventory, they are frequently the victims of title fraud. A dealer who unknowingly buys and resells a vehicle with a problematic title history has little choice but to suffer the resulting financial loss, which can be as much as 40% of the trade-in value of the car, and worse, the loss of reputation.

Based on the experience of our dealer members, we are convinced that a technological solution is necessary to resolve the current title fraud problems in the market place. A more transparent system is necessary to give purchasers more complete and reliable total loss data. With enhanced technology, every purchaser (individuals, new and used car dealers, or wholesale auctions) could obtain more timely, cost-effective, and complete title data by vehicle identification number (VIN).

NADA believes the best solution is legislation that provides vehicle history vendors, which have the funding and technological expertise to build upon the existing NMVTIS system, more timely and complete total loss data to disseminate to the public.

NADA supports legislation that would expand access for consumers by requiring insurance companies to make the VINs of their totaled cars public (such as posting the VINs on their website) so that vehicle history providers, such as CarFax and Experian, can reveal the history of the vehicle before it reenters the marketplace. (See attachment: "Tracking Totaled Vehicles for Consumers.") The legislation also requires insurance companies to disclose the VIN of a totaled vehicle, the reason for the total loss (flood, collision, stolen and recovered, etc.), the date of total loss, the odometer reading, and whether or not the airbag deployed. This legislation would not supersede state law. The legislation would substantially increase the **timeliness** of total loss disclosure by requiring insurance companies to provide data on totaled vehicles in an **electronic** format at the time of the total loss so that information can be more widely disseminated as an early warning system while the DMVs' paper system and NMVTIS catch up.

Providing commercial availability to total loss information that is easily accessible, searchable and affordable will also benefit the wholesale vehicle market, which involves millions of motor vehicle transactions each year. If wholesale auctions have access to NMVTIS data, fraudulently titled vehicles could be easily flagged for consumers expeditiously and efficiently.

NADA supports H.R. 1257, "The Damaged Vehicle Information Act", referred to the Subcommittee on Commerce, Trade, and Consumer Protection (House Energy and

Commerce Committee).⁵ The legislation was introduced by Congressmen Cliff Stearns (R-Fla.) and Gene Green (D-Tex.). Similar legislation, S. 202, "The Passenger Vehicle Loss Disclosure Act of 2009", was introduced by Senator John Ensign (R-Nev.) with 4 cosponsors (3 Democrats, 1 Republican) and has been referred to the Senate Committee on Commerce, Science, and Transportation. This legislation was also considered last Congress with strong bipartisan support.⁶

Insurer Objections to Legislation are Baseless since Insurers Maintain Private Total Loss Databases

The insurance companies have objected to total loss disclosure by arguing that the legislation would be burdensome. However, the requirements of the total loss disclosure legislation can be easily achieved since insurance companies already maintain their own total loss history databases regarding automobile insurance claims to share among themselves.

There are several private insurer databases such as ChoicePoint - the Comprehensive Loss Underwriting Exchange (CLUE) and the Insurance Services Office (ISO) – National Insurance Crime Bureau (NICB) database, the Automobile-Property Loss Underwriting Service (A-PLUS). These automotive databases contain total loss information and generate reports that assist insurance companies in determining risks. Members of Congress should reject the insurers' arguments that it would be burdensome for the insurers to report this total loss data because it would be very simple for the insurers to use an existing database such as NICB to accomplish the goals of this legislation and to protect consumers.⁷

Total Loss Disclosure is Far Superior to a Window Sticker Concept

NADA also wishes to respond to discussion during the March 5 hearing regarding window stickers with NMVTIS information. As noted above, NMVTIS's information is still incomplete and delayed. Therefore, it would diminish the value of the Guide if consumers

⁵The SAFR (Salvage Auto Fraud Reform Coalition), representing a broad coalition of stakeholders for the auto industry, signed onto this March 3 letter urging Congress to support total loss disclosure legislation (H.R. 1257/S. 202). National Automobile Dealers Association, Alliance of Automobile Manufacturers, American Honda Motor Company, American International Automobile Dealers Association, Association of International Automobile Manufacturers, Automotive Recyclers Association, Automotive Service Association, Experian, Hyundai Motor America, Mazda North American Operations, National Automobile Auction Association, National Association of Minority Automobile Dealers, National Independent Automobile Dealers Association, Toyota Motor America, Volkswagen of America, Inc.

⁶ Last Congress there was a full Committee hearing on total loss disclosure legislation S. 545, on April 11, 2007 before the Senate Commerce, Science and Transportation Committee. The sponsor of "the Passenger Vehicle Loss Disclosure Act" was Senator Trent Lott (R-Miss.) and the bill had 11 cosponsors (7 Republicans, 4 Democrats). After Senator Lott's retirement the bill was reintroduced as S. 3483, by Senator John Ensign (R-Nev.) with 2 new cosponsors (2 Democrats). The House companion, H.R. 1029, the Damaged Vehicle Information Act, was referred to the House Energy and Commerce Committee by Rep. Cliff Stearns (R-Fla.). The legislation received strong bipartisan support with 80 Cosponsors (42 Republicans, 38 Democrats).

⁷ The NICB has already partially opened up their database on a limited basis to allow a single VIN inquiry lookup for totaled vehicles for consumers – however there is little public awareness about this site. See www.nicb.org. It should be noted that this information is not available on a commercial basis.

were not able to fully rely on the information presented. In addition, there are practical and economic reasons why the suggestions to require dealers to disclose title information on the Buyers Guide does not make sense. This is especially true given existing state disclosure requirements; the fact that is NMVTIS is not a comprehensive solution, and the widespread availability of private solutions. The suggested approach may inhibit the development and implementation of solutions such as NMVTIS and other market-based solutions that may be more beneficial to the consumer.

Dealers and consumers alike would benefit from more and better information on title brands from all jurisdictions. NADA has long supported efforts to make this and other information available to NMVTIS in a timely fashion. Title brands should be more uniform, branding systems should be accurate, and databases should be complete. Pursuing these goals via a window sticker is an outmoded concept that makes little sense. Instead, this type of information should be gathered, maintained, and made available to consumers in an electronic format.

NADA strongly supports, and will continue to support projects such as NMVTIS and total loss disclosure legislation to aid in reaching those goals, and would urge the FTC and others to continue to join in these efforts, and in efforts to modernize and standardize the outdated state titling schemes. [Please see supplemental document: "Used Car Rule Regulatory Review".]

The following chart outlines some significant limitations with NMVTIS and how legislation for total loss disclosure could close many of these gaps; in particular, by making vehicle history information more timely and complete. NADA believes the most effective and cost effective system to combat title fraud is a combination of government (NMVTIS) and private sector resources such as vehicle history providers CarFax and Experian.

	NMVTIS Government system (Focus on State Paper Title)	Total Loss Disclosure Private Sector System (Focus on VIN)
Full State Participation Effectiveness of total loss disclosure requires full state participation	<p>All states need to participate to ensure the effectiveness of the NMVTIS program, yet 14 states are not yet participating. California, the state with the most automobile registrations in the U.S. does not allow NMVTIS to release their state data to consumers. This presents a large gap in information that can be exploited by unscrupulous sellers attempting to commit fraud.</p> <p>Problems with state participation exist because of:</p> <ul style="list-style-type: none"> • state resistance to losing revenue from vehicle history providers; • challenges with modernizing and reconfiguring state DMV computer systems to communicate with NMVTIS, and; • funding challenges since NMVTIS relies on federal and state funding. Congress is also skeptical of providing funding for system that is being performed by the private sector. 	<p>Vehicle history providers provide more comprehensive information and already purchase total loss data from all 50 states. These reports help consumers understand the differing salvage brands and their meanings and provide essential information for consumers, dealers and the wholesale used car market.</p> <p>Since these vehicle history report companies are private companies, they do not rely on taxpayer funding.</p>
Time Delay Effectiveness of system requires timely disclosure of total loss vehicles and the optimal goal is real time reporting	<p>NMVTIS suffers from a considerable time delay since, based on the 1992 statute, insurance and salvage pools are only required to disclose total loss vehicles on a monthly basis. While since that time, there have been tremendous technological advancements, the rule had to follow the monthly requirement in the statute. Insurance carriers may report on a timelier basis voluntarily, but are not required to.</p> <p>The lag time of up to 30 days under NMVTIS is unconscionable given the pace of used vehicle commerce. This loophole provides opportunities for unscrupulous individuals to launder totaled vehicles through the system and allows plenty of time for the vehicle to be sold to an unsuspecting consumer.</p>	<p>Legislation (H.R. 1257 & S. 202) would accelerate insurance reporting requirement by making it electronic and more prompt to eliminate opportunities for fraud.</p> <p>Under the legislation, the insurance companies would be required to provide the VINs of the totaled vehicle at the time of termination of the contract since it is critical that reporting of totaled vehicles occur as soon as possible.</p>

	NMVTIS Government system (Focus on State Paper Title)	Total Loss Disclosure Private Sector System (Focus on VIN)
Scope System requires the broadest scope of severely damaged vehicles	<p>Older Cars: The NMVTIS rule does not require insurance reporting of older vehicles. Under the statute, insurers only need to report on their inventory of all totaled automobiles of the current model year or any of the four prior model years.</p> <p>Since many consumers now keep their vehicle for more than five years, insurers should report more than current model years and last four years. Insurance carriers may report older vehicles voluntarily but are not required to.</p> <p>Self insured: The NMVTIS rule does not include all self insurers. The definition includes entities that underwrite their own insurance, such as certain rental car companies. The definition, however, excludes any organization that does not underwrite its own insurance, which creates a loophole whereby entities could avoid NMVTIS reporting requirements under the technical definition of self-insured.</p> <p>Airbags: Under NMVTIS there is no disclosure required, despite the fact that nonfunctioning airbags in wrecked and rebuilt vehicles poses a serious safety problem.</p> <p>Supplemental Information: Insurers could report more total loss data to NMVTIS voluntarily; however, historically they have not been willing to do so.</p>	<p>Older Cars: Under the legislation, insurers would have to disclose all totaled cars regardless of model year. Since less costly older vehicles with extensive damage can be just as unsafe, this expansion would give all consumers more protection regardless of economic status.</p> <p>Self Insured: The legislation would cover all self-insured vehicles, since these vehicles can escape disclosure. It is particularly important to cover all rental fleets.</p> <p>Airbags: The legislation requires insurers to report whether or not the airbag deployed.</p> <p>Supplemental Information: Under the legislation the reason for the total loss (flood, collision, stolen and recovered, etc.) is required. Requiring supplemental information such as specific reasons why a particular motor vehicle is labeled as 'junk' or 'salvage' will help produce a more complete vehicle record for a prospective purchaser to investigate further.</p>

	NMVTIS Government system (Focus on State Paper Title)	Total Loss Disclosure Private Sector System (Focus on VIN)
Commercial Access One of the most effective protections for consumers is access for the wholesale used car market. Over 41 million used cars are sold to retail consumers and each of these cars goes through approximately 1.6 wholesale transactions.	NMVTIS does not provide commercial access of DMV data for the wholesale used car market and dealers, which is the first line of defense in effectively protecting consumers against title fraud. Dealers need to have commercial access that allows the ability to perform multiple VIN lookups on totaled vehicles and to access total loss data in bulk. NMVTIS has stated that it will not provide information in bulk. While there is no commercial access at this time, DOJ has stated it has plans to include motor vehicle dealers in the scope of prospective information purchasers and to permit public and private entities involved in the purchase or titling of vehicles to access the NMVTIS system. However, given the other data NMVTIS is missing, dealers will continue to purchase private-sector vehicle history reports.	Vehicle history reports already provide a valuable service to the wholesale used car market. By making the total loss information commercially available, the information would be timelier and wholesale consumers (including dealers, auctions, and wholesale brokers) can have the most up-to-date information possibly prior to purchasing a used vehicle. Transparency at the wholesale level will only help to deter motor vehicle title fraud and enhance the NMVTIS system.
Consumer Access Informed consumers are critical to preventing used car fraud.	Under NMVTIS consumer access to DMV information is now available at www.nmvtis.gov as single VIN lookup. At this time, there is not much consumer awareness of the site. Also because of the limitations of NMVTIS, many consumers would still want to access vehicle history providers.	Vehicle history providers already provide consumer-friendly disclosure for the public. As experts in vehicle history reports, vendors provide much more user-friendly formats for consumers to learn vehicle history. Another advantage of providing consumer access is that these private entities can provide additional value for consumers, for example Experian offers vehicle history reports in Spanish. Vehicle history providers are also better served to market and advertise their vehicle history report services to the public. Often, dealers offer a free vehicle history report, or one can be purchased online from Web sites such as AutoCheck or Carfax.com.

	NMVTIS Government system (Focus on State Paper Title)	Total Loss Disclosure Private Sector System (Focus on VIN)
Integration with Other Vehicle History Sources While DMV data is useful, it is not the only source of data consumers need to learn the history of a vehicle.	DMV title information is informative, but to provide more full and comprehensive vehicle history, the NMVTIS data must be combined with other data.	In addition to the DMV data, vehicle history reports provide customers with a detailed record of the repairs, accidents and recall data within the lifetime of a used vehicle. Since vehicle history reports already exist in the marketplace and provide valuable information to consumers, it would be preferable to strengthen these providers. Legislation that places more timely and complete information into the public domain can then be utilized by the commercial marketplace. Dealers and consumers would greatly benefit from obtaining NMVTIS data and other relevant vehicle history information from a single source, rather than having to access and search multiple sources.

Understanding Dealer-Assisted Financing

By better educating consumers on rates, terms, APRs, down payments, etc., NADA seeks to ensure that financing remains available and affordable to the broadest spectrum of consumers. For many Americans, access to affordable transportation is the key to economic stability and upward career mobility. Owning a car dramatically expands an individual's job opportunities. Simply put, it is easier to find and keep a job if you have a car.

With 94 percent of all vehicle transactions utilizing financing of some sort, in-dealership financing combines convenience and competition for the benefit of consumers at all levels of the economic spectrum. Although obtaining financing through a dealership is not required to purchase a vehicle, millions of Americans choose this option every year. Franchised auto dealers have done a great deal over the past several decades to increase access to credit for all consumers. Dealers usually work with multiple banks, credit unions, and automakers' captive finance companies to secure financing for their customers. Because of this competition between these lenders, many who may not have a relationship with a bank can access the credit they need to purchase a car or truck. This competition between financers also reduces the cost of credit for car buyers. The mortgage crisis in this country has created a focus on all types of lending, but the difference between home mortgages and auto loans has never been greater. A home and a vehicle are two very different assets, as are the requirements and loans to purchase one. A home is generally viewed as an appreciating asset. This allows the number of loan products to vary significantly, even more so in a strong real estate market. Variable rates, equity lines of credit, and reverse mortgages, are all available to home buyers and owners. Banks can choose to take on greater risk. Even if there is a foreclosure, there is still residual value in a home.

On the other hand, a vehicle's value declines over time. This is simply a function of the used-vehicle marketplace. For instance, a newer model vehicle with low mileage has a greater value than the same model a few years older with more mileage. Banks and the automakers' captive finance companies consider this factor when making loan decisions. If they cannot make loan decisions based on the asset, **lenders must look primarily at the borrower for repayment of the financing** on a car or truck. As a result, there has been no reckless relaxing of the underwriting standards in the vehicle finance arena and thus there is no subprime lending "crisis" in automobile finance. Simply, the fact that a vehicle is mobile, in contrast to a home, makes it more difficult for local financial institutions to repossess a car in the event of a default. So, financing it requires significantly more scrutiny of the individual seeking the loan.

Because of the natural decline in value of a vehicle as it ages, there are few lending products available to car buyers. Variable rate loans, for instance, are generally not offered by franchised automobile dealers and there is not the ability for car owners to leverage the equity in their vehicle for additional loans; or at least not through franchised dealers. This is why the so-called "equity stripping" that has been so common in subprime mortgage lending typically cannot occur in the vehicle financing arena. Additionally, there are typically no prepayment penalties with auto credit. **The fact that a consumer can refinance their auto loan at any time without penalty is a powerful pro-competitive market pressure.**

Unlike the mortgage arena, there should be no surprises or troublesome fluctuations with vehicle financing and payments. Again, there are generally no variable rates in auto credit and, therefore, monthly payments do not increase during the repayment term. Many federal and state laws already require that all financing terms be clearly stated in the documents that a car buyer signs. Moreover, while many loans have negative equity at the outset, Federal law requires that this be fully disclosed to the consumer as well.

Increasing Financial Literacy throughout the Entire Car Buying Process

In today's difficult economic times, greater financial literacy is the key to ensuring that all consumers have the tools and resources to make sound personal economic decisions. The subprime mortgage crisis proves that it is even more critical for consumers to have a better understanding of the complex lending marketplace. To that end, NADA in partnership with auto lenders, the American Financial Service Association, and other automotive trade and dealer associations developed AWARE (Americans Well-informed on Automobile Retailing Economics). AWARE is a non-profit educational organization seeking to give new and used vehicle purchasers greater knowledge of how auto financing works.

AWARE publishes *What You Need to Know about Auto Financing*, which provides guidance on successfully navigating the car financing process. Prior to visiting a dealership, the coalition encourages a close examination of a car buyer's personal budget and their credit report to have a better understanding of what they can actually afford both in terms of the type and cost of the vehicle and financing. More importantly, AWARE suggests that consumers should consider all lending options including banks, finance companies, and credit unions. In doing so, the consumer can not only have a better understanding of the loan products available for vehicles but also be in a better position to negotiate the terms of the finance contract. When at the dealership, customers are urged to closely read the financing contract. Furthermore, it is important for consumers to determine whether or not optional loan products such as extended service contracts, credit insurance or guaranteed auto protection are necessary for them and how these products might affect their monthly payments. AWARE also discloses that a third party, such as a bank or finance company, may purchase the finance agreement from the dealer at a wholesale (or buy) rate. Then, it is this lender who will service the contract and collect payments from the car buyer.

AWARE's ultimate mission is to educate consumers. AWARE, through its website (www.AutoFinancing101.org), provides a whole host of information on the vehicle financing process. The site integrates calculators, advice, tools, articles, and other important resources in both English and Spanish. One such document lays out some specific steps that consumers should consider before financing a vehicle.

To ensure that this information reaches the greatest audience possible, AWARE partners with both public and private organizations, such as Internal Revenue Service (IRS), the Federal Deposit Insurance Corporation (FDIC), the Federal Trade Commission (FTC), the Council of Better Business Bureaus, USDA's Cooperative Extensive Service, JD Power and Associates, the Federal Reserve Bank of Chicago, New York State Banking Department, and many other groups. AWARE also reaches out to the next generation of car and truck buyers who are still in school by providing educator-focused teaching kits.



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Legal & Regulatory Group

March 17, 2009

SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex H)
600 Pennsylvania Avenue, N.W., Washington, D.C. 20580
Electronic address: <https://secure.commentworks.com/ftc-UsedCarRuleReview> (CRT Docket No. 106)

Re: "Used Car Rule Regulatory Review, Matter No. P087604"

The National Automobile Dealers Association ("NADA") submits the following supplementary comments to the Federal Trade Commission ("FTC" or the "Commission") regarding its notice of request for public comment ("Notice") on its Used Motor Vehicle Trade Regulation Rule ("Used Car Rule" or "Rule").

I) BACKGROUND

a) Comments Filed in Response to the Notice

The Notice was issued as part of the FTC's periodic regulatory review of the Used Car Rule. In the Notice, the FTC sought comment on "a range of issues" focusing on two specific questions: "whether a bilingual Buyers Guide would be useful or practicable," and whether changes should be made "to the Buyer's Guide [to] reflect the various types of [certified and other] warranties potentially available today."¹ Those comments were initially due on September 19, 2008, but on that date, the FTC announced that it was extending the comment period to November 19, 2008 at the request of a consortium of consumer groups.²

On November 19, 2008 NADA submitted comments ("Comments") which addressed the two questions specifically posed by the Commission and the proposed amendments to the Buyers Guide. The Comments also generally outlined NADA's view that the Used Car Rule continues to serve an important role in the disclosure of dealer warranties on used vehicles, and NADA's agreement with some minor modification of the Rule to allow dealers the option of disclosing manufacturer warranty information in addition to the current requirement that dealers disclose warranties the *dealer* may offer on a used vehicle. The Comments also detailed the inherent difficulty used car dealers face in trying to provide complete manufacturer warranty information,

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given the lack of access dealers have to adequate and accurate data. For all of the reasons outlined in our Comments, dealers often do not know and cannot determine manufacturer or other warranty information, and as discussed, it serves no one – dealers or used vehicle consumers - to require disclosure of incomplete or inaccurate information.

Other comments were also filed on the November 19, 2008 deadline. Several of these comments raise issues outside the scope of the Commission's regulatory review, and far beyond the specific questions raised by the Commission in the Notice. For example, comments filed on behalf of several consumer groupsⁱⁱⁱ ("Consumer Comments") suggest a number of far-reaching changes to the Used Car Rule that would transform the Rule beyond its current format and purpose, and impose significant, costly, and in some cases, impossible burdens on used car dealers. Similarly, comments filed by the National Association of Attorneys General^{iv} ("NAAG Comments") advocate changes in the Rule that would require dealers to provide information that not only goes far beyond the scope and intent of the Used Car Rule, but in many cases would require dealers to provide information they simply do not have.

NADA files these supplementary comments ("Supplementary Comments") to respond to several of those newly raised issues, which are beyond the scope of this periodic review and are thus not appropriate for formal consideration. NADA respectfully requests that the FTC consider these Supplementary Comments at this time because they address issues not specifically mentioned in the Notice, and because there has been no previous chance to respond to these newly raised issues. NADA also believes that it is important that the FTC consider the issues raised in these Supplementary Comments, as well as any raised by other parties, who should have the opportunity to address these proposals, before making the decision whether to engage in any formal rulemaking process on these issues.

II) PROPOSALS TO REQUIRE VEHICLE HISTORY AND TITLE BRAND INFORMATION IN THE BUYERS GUIDE ARE INAPPROPRIATE AND UNLIKELY TO PROVIDE SIGNIFICANT HELPFUL INFORMATION TO CONSUMERS

The main issue^v raised by both the Consumer Comments and the NAAG Comments that we wish to address in these Supplementary Comments is the suggestion that dealers be required to include vehicle history and title brand information on the Buyers Guide. The basic argument made in the NAAG and Consumer Comments is that:

- Certain standard vehicle history information is reflected on all titles in the United States;
- Such information is important to prospective purchasers and relevant to whether a used vehicle is covered under a manufacturer's warranty;
- Dealers covered by the Rule have ready access to such information, and therefore;
- Such information should be included on the Buyers Guide.

The true facts belie this argument at every turn.

First, vehicle history and title brand information proposed to be required on the Buyers Guide comes from vehicle titles, which are regulated by state laws involving long-established, and vastly differing statutory schemes. This lack of uniformity makes any national disclosure

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standard nearly impossible, and in and of itself precludes the use of the Used Car Rule as a means of disclosing vehicle history information as the Rule was specifically designed to be national in scope, and to provide simple, well recognized, and easily understood warranty information to prospective purchasers in every state.

Second, even assuming that some title brands may have an effect on a used vehicle's continuing coverage under a manufacturer warranty, the Used Car Rule requires only that dealers disclose what warranty (if any) they are providing on a vehicle. *Dealer* warranties have no connection to vehicle history or title brand and such information would not help prospective purchasers determine warranty coverage when shopping for a used vehicle.

Third, title brand and vehicle history information is often not available to dealers because a used vehicle title is often not at the dealership when vehicles are being offered for sale, and NMVTIS in its current form is not a viable solution. Moreover, title information, even when available, is often unreliable, and as a result, of marginal use to the consumer.

Fourth, it would be inappropriate to require such disclosures under the guise of the Used Car Rule, which as noted above requires only that dealers disclose *dealer* warranty information. To the extent prospective consumers are interested in a vehicle's title history information, however imperfect, such information is available through the National Motor Vehicle Title Information System (NMVTIS) and through private providers such as Carfax or Autocheck. Again, however, such information is outside the scope and intended purpose of the Rule.

Finally, and perhaps most importantly, disclosure of this information on the Buyers Guide is an outdated and incomplete solution that does little to address the concerns raised. Used vehicle consumers do not need a box on the Buyers Guide that would provide incomplete and difficult to understand information. They need real-time access to accurate vehicle history information. Efforts to implement such measures are currently underway and should be allowed to continue. NMVTIS is designed to fill the void in public knowledge about vehicle history. At this time, it is not a workable solution, but once it is fully implemented it will provide valuable information to consumers. In addition, Congress is currently considering^{vi} other efforts, such as total loss disclosure legislation (discussed in more detail below) that would address the heart of the concerns outlined in the NAAG and Consumer Comments. NADA has strongly supported these efforts and others to bring these systems into the twenty-first century. Rather than superimposing an incomplete paper-based solution onto a warranty disclosure document, the FTC should support the development and implementation of those modernization efforts to improve real-time electronic access to information about used vehicles.

In sum, forcing dealers to disclose vehicle condition and title brand information on a form designed for dealer warranty disclosure would not only expand the Rule far beyond its intended scope, it would be inefficient, would interrupt other, more complete solutions, and would bring confusion rather than clarity to the used vehicle marketplace.

a) A National Disclosure Standard is Virtually Impossible Because State Title Brand and Vehicle History Information is Not Uniform

To include title brand and vehicle history in the Buyers Guide, the Guide would have to be modified so that dealers, using a revised standard form, could disclose this information.

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However, developing such a standard format that would convey any meaningful information to consumers would be nearly impossible.

The states regulate titles for vehicles and each of the fifty states has different title requirements and regulations. These state provisions differ in many important ways including:

- how and when titles are issued and to whom they are issued;
- how and whether duplicate titles are issued;
- who holds the title on a vehicle with a lien -- the consumer or the lienholder;
- how and where liens are recorded on the title;
- what title brands the states use, which brands are reflected on the title, and how;
- what the title brands mean;
- how long it takes for title brands to be reflected on the title, and;
- whether and which title brands from other states carry over for a vehicle previously titled in that other state.

These key differences make the interpretation and collection of title history information very difficult, and a national disclosure standard nearly impossible. Each of these factors affect a dealer's access to the title and the utility of that information reflected on the title.

For example, there simply is no standard set of title brands that could be used on a national form because each of the states uses a unique set of title brands.^{vii} A state title brand chart from the American Association of Motor Vehicle Administrators ("AAMVA"), attached as Exhibit A, shows the wide array of title brands used. For example:

- Alaska uses only one title brand - "Reconstructed"
- Kentucky uses: "Odometer brands (exceed mechanical limits, not actual mileage)", and "Hail Damaged".
- Colorado uses only "S" for salvage.
- Idaho uses: (1) "Bonded"; (2) "issued upon statement of applicant"; (3) "glider kit vehicle"; (4) "for junk only"; (5) "reconstructed vehicle"; (6) "replica-reconstruct vehicle"; (7) "specially constructed vehicle"; (8) "branded by previous state, brand carried forward from previous title"; (9) "repaired vehicle".
- Maryland uses: "Duplicate Title", "Corrected Title", "Fuel legends", "Odometer legends", "TAXI", "XTAXI", "XSALVG", "KT (Kit)", "GLKT (Glider kit)", "ACV (All terrain, 3-wheel)", "RECO (Reconditioned)", "ATV", "Reconstructed", and "Rebuilt".
- Pennsylvania uses: A— Antique Vehicle; C— Classic Vehicle; D— Collectible Vehicle; F— Out of Country; G— Originally Mfgd. for Non-U.S. Distribution; H— Agricultural Vehicle; L— Logging Vehicle; P— Formerly a Police Vehicle; R— Reconstructed; S— Street Rod; T— Recovered Theft Vehicle; V— Vehicle Contains reissued VIN; W— Flood; and X— Formerly a Taxi.

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In addition, states often treat title brands from other states differently.^{viii} For example:

- In Alabama, title brands from other states are captured in Alabama's database, but not printed on the title
- In Alaska, title brands from other states are generally not carried forward onto subsequent titles.
- Idaho carries title brands from other states but lists them under "Other Pertinent Data."
- In Minnesota, title brands are carried over from other states unless the vehicle is over 6 years old.
- In Montana, title brands are carried over from other states "whenever possible."
- In Texas, they carry forward out of state brands onto the Texas brand only under certain circumstances.

This is one of several reasons why a used vehicle's title does not accurately reflect information about the vehicle itself.

Moreover, the same terms often have different meanings in different states. For example, a "salvage" vehicle in Arkansas is any vehicle that has sustained physical damage that equals or exceeds 70% of the average retail value of the vehicle. In Connecticut, a "salvage" vehicle is one that has been declared a "total loss" by an insurance company or by a self-insured organization. Colorado's statutory definition of a "salvage" vehicle is a vehicle less than six (6) years old that is damaged by collision, fire, flood, accident, or other occurrence, excluding hail damage, in excess of the retail fair market value of the vehicle.^{ix} But in Montana, "Salvage vehicle" means a vehicle damaged by collision, fire, flood, accident, trespass or other occurrence to the extent that the owner, an insurer, or other person acting on behalf of the owner determines that the cost of parts and labor makes it uneconomical to repair the vehicle. The point is that even if some standardized disclosure format were adopted, terms like "Salvage" used on that form have vastly different meanings in different states and may bring more confusion than clarity to the marketplace.

These are just a few examples of why the suggestions made in the NAAG and Consumer Comments make little sense as a practical matter. NADA is and has been a strong proponent of efforts designed to bring uniformity to the way states brand and transfer brand information, and of a complete centralized database for such information, easily accessible to prospective consumers. The bottom line, however, is that without a vast overhaul of the current, outdated, paper-based state titling regime, it would be nearly impossible to synthesize a form that would be able to accurately reflect the various state title brands.

In addition, such a national standard ignores that complex and long-established statutory regimes states have implemented (and dealers and consumers alike have come to rely on) regarding titling and disclosure issues. The states have developed titling procedures and entire infrastructures based on, and in reliance on their own scheme. Furthermore, as noted in the NAAG Comments, part of the current scheme in many states includes a requirement that dealers

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and other vehicle sellers disclose certain information about a vehicle's history.^x As a result, there is little need for a national solution where disclosure is already required under state law.

b) Title Information is Often Unavailable and Often Unreliable

Both the Consumer Comments and the NAAG Comments seem to suggest that disclosure of vehicle history and title brand information on the Buyers Guide would be simple and virtually cost-free – little more than a matter of checking a box on the Buyers Guide.^{xi} Unfortunately, this is simply not accurate.

i) Dealers Often Do Not See the Title

Title brand information about a vehicle exists in only two places: (1) on the physical title itself, and (2) in the issuing state titling agency's database. For any number of reasons, dealership used vehicle department personnel responsible for accurately completing and posting Buyers Guides neither have access to physical titles, nor to any title database.

Most customers who trade in a vehicle as a part of a new or used vehicle purchase transaction have a lien on that trade in vehicle. In most states, where there is a lien on a vehicle, the lienholder holds the title. This means that the title is not present at the time of the transaction and it make take a great deal of time for the dealer to get the title. The Consumer Comments explain:

"[M]ost states allow dealers to sell traded-in vehicles or vehicles purchased from auctions or other dealers before they obtain clear title to them. The dealer cannot show the buyer the title because it is still in the possession of the previous owner or the lienholder. It may take a month or longer before the dealer obtains title, if at all."^{xii}

A title may also not be present as the prior owner may have lost it. This happens with great frequency. At other times, used vehicle titles are held by a floorplan finance source or are kept in a central location for safekeeping. The Used Car Rule was designed to provide warranty information, and it works because such information is readily available to the seller since the seller has control over and first hand knowledge of this information. By contrast, even when accurate, vehicle history information is neither readily available nor easily verifiable.

ii) NMVTIS is Not a Viable Solution

In addition, despite claims to the contrary, dealers simply do not have electronic access to the state title brand databases. Much is made in both the Consumer and NAAG Comments of the enactment of the National Motor Vehicle Title Information System ("NMVTIS"), but the reality is that NMVTIS is simply not a viable solution. NMVTIS may be "intended to make both positive and negative vehicle history information available at a keystroke to American car buyers," but it currently does not.^{xiii} Only 13 states currently fully participate with NMVTIS. While the Department of Justice and others are working diligently to implement NMVTIS, efforts to establish the national database have been ongoing since the Anti-Car Theft Act was passed in 1992, and have had a long and difficult history since that time.

NADA supports efforts to fully implement the current rule as well as efforts to modernize the NMVTIS rule, which is based on a 17-year-old law. The following limitations of NMVTIS are important loopholes that NADA has been seeking to address with federal legislation:

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- full state participation is necessary for complete and accurate information;
- delayed insurance and salvage reporting of totaled vehicles still allows for some totaled vehicles to escape disclosure;
- the scope of total loss information must be expanded to cover more vehicles and more safety information;
- the wholesale used car market needs commercial access to alert consumers to stay away from severely damaged vehicles; and
- DMV information must be integrated with other sources of vehicle history information to streamline information to make it more efficient and accessible to the public.

The bottom line is that it makes no sense to require dealers or anyone else to disclose title information based on a claim that such information is currently “readily available” via NMVTIS.

iii) Title Brand Information is Often of Limited Value

Of course, even where the dealer has access to the title or a title database, the information is only as good as the information reflected on the title or in that database. Again, the Consumer Comments identify this problem noting that “even if a buyer were to see the title, it would still not be a reliable form of disclosure.” *Id.*

There are several reasons why a paper title or a check of the state title database may reflect no title brands even where they exist. First, by definition, a “washed” title will reflect no title brand. A national titling system is only as strong as the weakest link, and as long as unscrupulous individuals can get a new “clean” title in another state, any title brand information will be suspect. NADA supports efforts to improve these processes and to eliminate title washing loopholes.

Even an “unwashed” title may not be reliable. For example, it can take up to six weeks for title updates to be reflected in the state database.^{xv} This time delay allows for significant opportunities for wrongdoing and thus undermines the potential accuracy of any title databases. Consumers who rely on the title brand or the title brand database are often relying on bad information and may believe a vehicle has not been wrecked or that the vehicle has a “clean” title even when it does not. Rather than providing useful information to consumers, such disclosures would lead to confusion and may actually give consumers a false sense of security about the history or safety of a vehicle.

iv) Title “Washing” Is a Serious Concern for Which There Are Solutions

Reselling flooded and other salvage vehicles by “washing” the title is a serious problem. As noted above, the current outdated, non-uniform state titling system allows determined individuals to find ways to introduce potentially dangerous vehicles into commerce.

One factor that contributes to this problem is that currently, insurance companies do not always disclose the VINs of vehicles that have been declared a total loss. To combat this problem, NADA has long advocated for better tracking of wrecked, flooded, and stolen vehicles by requiring insurance companies to fully and electronically disclose the VINs of all totaled vehicles. (See NADA Issue Summary and related chart attached as Exhibits B and C).

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Disclosure of the VINs of totaled vehicles is an important way to improve the accuracy and utility of state databases and NMVTIS.

c) The Wisconsin Model is not Appropriate or Workable on a National Scale

Both the NAAG and Consumer Comments point to Wisconsin as a model that the FTC should follow in adopting changes to the Used Car Rule Buyers Guide.^{xv} The NAAG Comments contend that “[i]f Wisconsin dealers are required and can determine facts sufficient to make that disclosure, so too should dealers in the rest of the nation.”^{xvi} Such comparisons, however, simply do not work.

First, as addressed above, while a standardized form designed for a particular state may be feasible in that state, under the current system no such standardized form would function on a national basis. The Wisconsin form reflects the title brands used in Wisconsin, and Wisconsin dealers and consumers can understand or readily determine the meaning and importance of those brands. The same would not be true nationwide.

Second, some of the specific provisions in the Wisconsin titling scheme make title brand disclosure more feasible. For example, Wisconsin carries forward title brands from other states, which other states do not do, or may do on a limited basis. Another crucial difference between Wisconsin and most other states is that Wisconsin is among the minority of states where the individual consumer is issued the title regardless of the existence of a lien.^{xvii} This means that unlike most other states, Wisconsin dealers generally have access to the title when they take in a trade, and can determine whether it reflects any title brands.

The bottom line is that a system that works in one state will not translate nationally. Unless and until a uniform state titling process is enacted, no such national standard is possible.

In addition, the Wisconsin approach is the direct result of a provision in the Used Car Rule that allows for states to petition for an exception from the standard, uniform, easy to understand national Buyers Guide. In fact, Wisconsin's process predated the federal rule and, through the exception process, was in effect grandfathered by it. This exception to the Rule was fully considered by the FTC when the Used Car Rule was promulgated. It is not appropriate as a national standard and should not now somehow become the Rule itself.

d) The Used Car Rule Requires Disclosure of *Dealer* Warranties Which Have No Connection to Vehicle History or Title Brand

Even if a practical solution to these problems could be found, such disclosures would not be appropriate under the Used Car Rule. The Buyers Guide is designed to allow prospective purchasers to determine what warranty coverage is provided on a used vehicle by the selling dealer. The nature and extent of warranty coverage is useful to a prospective purchaser because that warranty coverage protects a used car consumer from a wide array of potential problems. The Buyers Guide allows for easy dealer warranty information comparison for prospective purchasers.

The claimed nexus underlying the proposals to require dealers to provide this information on the Buyers Guide pursuant to the Used Car Rule is that title history can affect warranty coverage.^{xviii} For example, the NAAG Comments claim “that prior history is a determinant of whether the warranty the selling dealer claims is available is truly available.”^{xix} However, such

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claims mistakenly conflate dealer and manufacturer warranties. Even assuming that a vehicle's prior history may affect whether it is covered under a *manufacturer* warranty, it is irrelevant to any warranty the *dealer* may issue, which is all that the Used Car Rule requires to be disclosed.

Title brands are but one of a number of facts that can affect manufacturer warranty coverage. Others include the transferability of the warranty from the original owner, vehicle maintenance and service records, installation of certain aftermarket or other products on the vehicle, and changes or updates to the warranty programs themselves. Any or all of these factors could potentially void or limit a manufacturer's warranty, but dealers neither know whether these factors affect a given warranty, let alone any way of conclusively determining whether any of these circumstances exist on a given vehicle.

The FTC has long recognized that dealers generally do not know whether a manufacturer's warranty applies, and the Rule does not require that such information be disclosed. The same holds true for vehicle history and title brand information. Dealers often do not have access to this information, and even when they do, it is often outdated, inaccurate, or misleading. The Used Car Rule has a specific purpose, and it has served that purpose well. It is not designed to be, is not currently, and should not become a catch-all disclosure rule requiring dealers to disclose information they may not have and cannot verify.

e) Current Solutions Exist and Should be Allowed to Work

i) Private Reports, While Limited, Are Publicly Available

We agree with the Consumer and NAAG Comments that the desire for vehicle information has seen private alternatives such as Carfax and Autocheck become increasingly popular.^{xx} The data from these and similar private companies is often more complete than the state databases or the current iteration of NMVTIS because they obtain data from more sources. However, as the Consumer Comments note, the "information provided by [services such as Carfax and Autocheck] is far from complete and often unreliable" and "[o]ften, pertinent information such as prior damage histories, do (sic) not appear in a timely fashion, or at all, so the data can be quite misleading."^{xxi}

The services that those companies provide can be helpful in that they provide one central location for data from multiple sources, but at the end of the day, because they purchase their data from the states and other sources, it is still only as timely and accurate as the data in the source's database. In fact, the data is less timely than that in the state and other databases because they often do not get updates in real time. Therefore, even if the state (or other) database is timely; Carfax or Autocheck will not be until they receive and process a periodic update which may be weeks later. (As discussed above, this is one reason why NADA believes that the total loss disclosure legislation is necessary to accelerate the accurate reporting of totaled vehicles.)

ii) Requiring Dealers to Run a Private Report Would Unnecessarily Add to the Cost of Used Vehicles

The NAAG Comments suggest that the proposed requirement to disclose vehicle history and title brand information could be met by forcing the dealer to run a private report from one of these companies.^{xxii} Putting the utility of such reports aside, forcing dealers to pay \$20-30 or more to a private company for potentially each prospective purchaser of each used vehicle would

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add a considerable cost to all cars that dealers would have to pass along to actual purchasers. The marketplace should decide (and is already deciding) whether this information is worth the price. Consumers who value this information despite its limitations already get it themselves through dealers or otherwise. While dealers are often more than willing to conduct such checks for their prospective purchasers who desire one, mandatory checks are unjustified.

iii) A Large and Growing Number of Dealers Already Provide Reports

Finally, as both the NAAG and Consumer Comments note,^{xxvii} a significant and growing number of dealers already offer Carfax, Autocheck, or similar reports with all the used cars they sell at retail. These reports are gaining wide acceptance with the used car buying public, and in many markets, it is quickly becoming a standard part of many transactions. Consumers to whom this information is important can obtain the reports themselves, or shop based on the availability of such information from the dealers. While for all the reasons described above, these reports are certainly far from perfect, they do provide consumers with options to consider.

iv) NMVTIS and Other Proposals Currently Before Congress Such as Total Loss Disclosure Legislation are the Long Term Solutions

For over a decade, NADA has championed efforts to better track severely damaged vehicles and worked for enactment of legislation and rulemaking to establish NMVTIS to connect all state DMVs to combat title fraud. NADA also strongly supports the Justice Department's recent rule that establishes NMVTIS and requires insurance and salvage yards to report totaled vehicles. NADA believes the NMVTIS system is a critical, but still incomplete, tool to detect auto salvage fraud. Total loss disclosure legislation is currently before Congress, and if enacted will help consumers gain access to more current information about a vehicle. Such efforts will take time, but they should be given the opportunity and time needed to work. The proposals to enact a paper based solution would neither be appropriate under the Used Car Rule, nor helpful to consumers.

III) CONCLUSION

The Used Car Rule and the Buyers Guide assist prospective purchasers by requiring disclosure of dealer warranties. It would diminish the value of the Guide if consumers were not able to fully rely on the information presented. In addition, as described above, there are practical and economic reasons why the suggestions to require dealers to disclose title information on the Buyers Guide does not make sense. This is especially true given existing state disclosure requirements, the fact that NMVTIS is not a comprehensive solution, and the widespread availability of private solutions. The suggested approach may inhibit the development and implementation of solutions such as NMVTIS and other market-based solutions that may be more beneficial to the consumer.

Dealers and consumers alike would benefit from more and better information on title brands from all jurisdictions. NADA has long supported efforts to make this and other information available to NMVTIS in a timely fashion. Title brands should be more uniform, branding systems should be accurate, and databases should be complete. Pursuing these goals via a window sticker is an outmoded concept that makes little sense. Instead, this type of information should be gathered, maintained, and made available to consumers in a uniform electronic format. NADA strongly supports, and will continue to support projects such as NMVTIS and total loss

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disclosure legislation to aid in reaching those goals, and would urge the FTC and others to continue to join in these efforts, and in efforts to modernize and standardize the outdated state titling schemes.

NADA appreciates the FTC's consideration of these Supplemental Comments, and looks forward to working with the Commission in its efforts to improve and update the Buyers Guide. Please feel free to contact us if we can provide additional information that would be useful in your inquiry going forward.

Sincerely,

Bradley T. Miller
Associate Director, Legal and Regulatory Affairs

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¹ July 16, 2008 news release announcing approval of Federal Register Notice on Regulatory Review of Used Car Rule: <http://www.ftc.gov/opa/2008/07/ucr.shtm>.

² <http://www.ftc.gov/opa/2008/09/ucersun.shtm>. The groups that sought the extension were Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, National Association of Consumer Advocates, and National Consumer Law Center, *see* September 12, 2008 letter posted at <http://www.ftc.gov/os/comments/usedcarrule/080912requestforcomment.pdf>.

³ Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center, U.S. Public Interest Research Group, and the Watsonville Law Center, Comment # 536945-00015, November 19, 2008, John Van Alst.

⁴ Comment # 536945-00013, November 19, 2008, submitted by Ellen Taverma.

⁵ These Supplementary Comments do not address the proposal in the Consumer Comments to require a vehicle inspection. We note only that such efforts have a long history and have repeatedly been rejected by the FTC, by Congress, and others. The NAAG Comments note that “[s]imilar inspection requirements that were implicitly imposed in the precursor to the Used Car Rule resulted in industry opposition to that rule and the subsequent Congressional effort to veto that defect disclosure rule. *We are not advocating reincarnating that long-ago debate.*” See NAAG Comments at 7 (emphasis added). For all the same reasons prior efforts were rejected, such disclosures must not be required.

⁶ On March 5, H.R. 1257, The Damaged Vehicle Information Act was the subject of a Subcommittee on Commerce, Trade, and Consumer Protection (House Energy and Commerce Committee) hearing. The legislation was introduced by Congressman Cliff Stearns (R-FL) and Gene Green (D-TX).

S. 202, The Passenger Vehicle Loss Disclosure Act of 2009, was introduced by Senator John Ensign (R-Nev.) with 4 cosponsors (3 Democrats, 1 Republican) and has been referred to the Senate Committee on Commerce, Science, and Transportation.

Last Congress there was a full Committee hearing on total loss disclosure legislation S. 545, on April 11, 2007 before the Senate Commerce, Science and Transportation Committee. The sponsor of “the Passenger Vehicle Loss Disclosure Act” was Senator Trent Lott (R-Miss.) and the bill had 11 cosponsors (7 Republicans, 4 Democrats). After Senator Lott’s retirement the bill was reintroduced as S. 3483, by Senator Ensign with 2 new Democratic cosponsors. The House companion, H.R. 1029, The Damaged Vehicle Information Act, sponsored by Rep. Stearns, received strong bipartisan support with 80 Cosponsors (42 Republicans, 38 Democrats).

⁷ The following data is from “The Fast Track to Vehicle Services Facts”, a survey of U.S. and Canadian state motor vehicle departments, conducted by the American Association of Motor Vehicle Administrators, Section 2, pp. 39-42. (See also 2006 AAMVA Title Brand Chart attached as Exhibit A, and the “NADA Title and Registration Textbook,” 2008 Edition.)

In response to the question “What title brands are used in your jurisdiction?,” the states responded as follows:

Alabama - Salvage; Rebuilt; Reconstructed; Odometer Legends; Assembled; Sold for Parts Only; Frame Change; “This certificate of title issued under a three year surety bond;” “This is a replacement certificate and may be subject to the rights of a person under the original certificate;” Lemon-Law code— “This vehicle was returned to the manufacturer because it did not conform to its warranty;” those brands notated from foreign states titles prior to July 1, 1985, such as a police car, flood or water damage, permit to dismantle, previously recorded as salvage.

Alaska - “Reconstructed Vehicle” and “Specially Constructed Vehicle”

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Arizona - Salvages, Dismantles, Reconstructed, Restored Salvage, Duplicate.

Arkansas - "Replacement" (duplicate title), "Damaged" (salvage), "Previous Damage" (rebuilt salvage), "Assembled Vehicle" and NHTSA required odometer brands.

California - Salvaged, Non-Repairable, Lemon Law Buyback, Warranty Return, Police, Prior Police, Taxi, Prior Taxi, Non USA and Remanufactured, Competition MC, Park Trailer.

Colorado - "S" for salvage.

Connecticut - Rebuilt; Duplicate: Distinctive (may be subject to undisclosed lien); (Safety) inspection required to register; Title Only; Bond Posted; Glider Kit; True Mileage Unknown.

Delaware - N-New; T-Transferred; X-Taxi; R-Reconstructed; P-Previous Taxi; F-Flood Damaged; A-Antique; D-Disabled Veteran; S-Salvaged; E-Exempt (Brand appears in the use block).

District of Columbia - Vehicles titled as salvage in prior jurisdiction, DC will stamp "Salvage" on face of DC certificate of title.

Florida - Salvage, Rebuilt, Police Car, Taxi, Glider Kit, Electric, Water Damage, lease, replica, assembled Kits, and any odometer brand that is applicable.

Georgia - Salvage, rebuilt, replacement, flood damage, odometer legends, fire damage, bond legend, stolen---unrecovered and special constructed.

Hawaii - Previously junked vehicle; replica vehicle; reconstructed/rebuilt vehicle insured salvage rebuilt vehicle; glider kit vehicle; kit vehicle; duplicate. The following brand appears on our certificate of registration when title is being withheld pending completion of certain requirements: Vehicle not transferable.

Idaho - (1) Bonded; (2) issued upon statement of applicant; (3) glider kit vehicle; (4) for junk only; (5) reconstructed vehicle; (6) replica-reconstruct vehicle; (7) specially constructed vehicle; (8) branded by previous state, brand carried forward from previous title; (9) repaired vehicle.

Illinois - Rebuilt and Not Eligible for Registration. Do not brand Salvage or Junk, but do issue salvage and junking certificates. Specially constructed can also be printed in the make or body type fields.

Indiana -Buy-back— Disclosure on File, Dup voids original, correction, salvage title, rebuilt vehicle, rebuilt, do not register, odometer— actual, odometer— is not actual, odometer— exceeds mechanical limits.

Iowa - Rebuilt, Rebuilt and a two-digit state abbreviation, Salvage, Salvage and a two-digit state abbreviation, Flood, Fire, Theft & Vandalism Two-digit state abbreviation, Prior salvage— July 1, 1992.

Kentucky - Odometer brands (exceed mechanical limits, not actual mileage). Hail Damaged.

Louisiana (AV)— Assembled Vehicle, (DT)— Duplicate Title, (GK)— Glider Kit, (KC)— Kit Car, (ME)— Mileage exceeds mechanical limits, (NM)— Not actual mileage, (RC)— Reconstructed/Wrecked Vehicle, (ST)— Salvage Vehicle, (WA)— Water Damaged.

Maine - Salvage, rebuilt, reconstructed, imported, duplicate, may be subject to an undisclosed lien, may be subject to the rights of a prior owner, issued on bond, water damage. Salvage brands: collision, fire, water damage and theft. Odometer: per TIMA.

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Maryland - Duplicate Title, Corrected Title, Fuel legends, Odometer legends, TAXI, XTAXI, XSALVG, KT (Kit), GLKT (Glider kit), ACV (All terrain, 3-wheel), RECO (Reconditioned), ATV, Reconstructed, and Rebuilt.

Massachusetts - Odometer Brands: Odometer Altered; Odometer Discrepancy; Odometer Replaced. Other Brands: Undisclosed Lien, Memorandum/Non-negotiable; Vehicle Bonded. Salvage Brands: Reconstructed Brands; Repairable Parts Only; Fire; Flood; Theft; Vandalism; Collision; Salt.

Michigan - Police, Taxi, Municipal, Duplicate, Salvage Vehicle. This vehicle was previously issued a salvage title, not eligible for plate— no tax paid. Not eligible for plate— Safety inspection required.

Minnesota - Salvage, rebuilt, flood, reconstructed, prior salvage.

Mississippi - Salvage, rebuilt, other, previous title contained brand, flood.

Missouri - Original, duplicate, non-negotiable, repossessed, corrected, mechanic lien, salvage, junking, reconstructed motor vehicle, specially constructed vehicle, motor change vehicle, and non-USA standard vehicle, prior salvage and bonded vehicle. Non-negotiable is not a title brand – it is a title type.

Montana - HMDE, HOME, KT, RB, REBUILT, JUNKED, RE, JUNKED, DUPLICATE. Rebuilt salvage reconstructed, rebuilt title, bonded title, flood damage, unrecovered theft, recovered theft.

Nebraska - Salvage, previous salvage, non-transferable, manufacturer buyback And any other state's brand carried forward with that state's 2-digit abbreviation.

Nevada - Flood damage, lemon law buyback, non-rebuild able, non-US vehicle, and not street legal.

New Hampshire - Duplicate, Salvage, Re-Built, Reconstructed, Direct Import Vehicle, Glider Kit, Bonded Vehicle, Recovered Theft, Flood Damaged Vehicle, Homemade Vehicle, Replica Vehicle, Actual Mileage, Not Actual Miles, Exceeds Mechanical Limits, Mileage in Kilometers. New Hampshire also will carry over any brands placed on foreign state titles re-titled in New Hampshire.

New Jersey - S— Salvage; F— Flood; T— Taxi; P— Police; A— Actual Mileage; N— Not Actual Mileage; M— Mileage exceeds the mechanical limits; L— Lemon.

New Mexico - Salvage, Homemade, Rebuilt, Original, Duplicate, Non-Negotiable.

New York - Reconstructed, Non-USA standard, Lemon Law, Odometer.

North Carolina - Reconstructed, Salvage Rebuilt, New Salvage, Water Flood.

North Dakota - Salvage and Damaged.

Ohio - Rebuilt Salvage, self-assembled Vehicle, Flood Vehicle, Former Taxi, buyback vehicle and Former Police Vehicle.

Oregon - Previously damaged (state); Reconstructed; Replica; Assembled; Totaled.

Pennsylvania - A— Antique Vehicle; C— Classic Vehicle; D— Collectible Vehicle; F— Out of Country; G— Originally Mfgd. for Non-U.S. Distribution; H— Agricultural Vehicle; L— Logging Vehicle; P— Formerly a Police Vehicle; R— Reconstructed; S— Street Rod; T— Recovered Theft Vehicle; V— Vehicle Contains reissued VIN; W— Flood; X— Formerly a Taxi.

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Rhode Island - Salvage, Unrecovered theft, Flood damaged, reconstructed/kit vehicle.

South Carolina - Odometer reading is in excess of its mechanical limits; odometer reading is not actual mileage; Warning: Odometer discrepancy; Salvage; Salvage-Fire; Salvage-Water; Salvage-Non-removable; Rebuilt; This is a valid and assignable certificate of title, however, this vehicle may be subject to an undisclosed lien. (Off-road use).

South Dakota - Rebuilt.

Tennessee - Rebuilt, Salvage, non-repairable, Specially Constructed, Salvage, Not Actual Mileage, Exceed Mechanical Limits. We attempted to maintain all brands of other states if we do not have a corresponding brand.

Texas - Diesel, DOTS Standards Proof Required, Exempt, Flood Damage, Fixed Weight, Permit Required to Move, Reconditioned (issued 1996 and previous), Rebuilt Salvage-Loss Unknown, Rebuilt Salvage-75%-94% loss, Rebuilt Salvage loss, Rebuilt Salvage-Issued by, Reconstructed, Survivorship Rights, Actual Mileage, Not Actual Mileage, Mileage Exceeds Mechanical Limits.

Utah - Rebuilt/Restored; Flood/Restored; Manufacturer's Buyback; Damaged; Duplicate; Title Only.

Vermont - Salvage, Rebuilt, Undisclosed Lien, Glider Kit. Abandoned Duplicate.

Virginia - Salvaged, Salvage Rebuilt, Reconstructed, Water Damaged and Ex-Taxi.

Washington - Former Taxicab, Former For Hire, Former Exempt, Rebuilt, Street rod and Extaxi. Washington does not assign salvage, junk and destroyed brands but will carry those brands from other jurisdictions.

West Virginia - Salvage Certificate, Not to be titled, Reconstructed Vehicle, Flood or Fire Damage.

Wisconsin - This vehicle has been flood damaged; This vehicle transferred to insurer upon payment of claim; This vehicle was manufactured as a Non-USA Standard and has been modified to meet Federal Safety and emission standards; This vehicle was previously used as a police vehicle; This vehicle is rebuilt salvage— WI Inspection passed; This motor vehicle has previously been used as a taxicab or for public transportation; This vehicle previously junked and reconditioned (only on titles where the legend already exists); This vehicle may be subject to an undisclosed security interest; Not for highway use, junked and not reconditioned (only on title where the legend already exists). (If purchased prior to May 1, 1989—a salvage title would be issued); 5 percent WI sales tax paid on this vehicle; NO WI sales tax paid on this vehicle; This is a replacement certificate and may be subject to the rights of a person under the original certificate; This vehicle has been inspected and complies with MVD percent and WIS STATS Chpt. 347 Inspection Date, Officer Signature, Title Employed By (Law Enforcement Agency) _____ (Only used for the The Fast Track to Vehicle Services Facts current TO defective titles that have not yet been inspected) (There will not be any more TO defective titles produced); Special designed vehicle; certificate of registration must be carried in vehicle at all times; previously titled in _____; Previously titled in _____ as _____; Previously titled in _____ showing; Previously titled in a foreign country; vehicle previously owned by U.S. Government; This is a salvage vehicle; this vehicle is a manufacturer's buyback; this is a replica vehicle; this is a street modified vehicle; WI also note what state the vehicle was previously titled in.

Wyoming - Salvage, rebuilt, flood, hail, vandalism, junk, collision

^{viii} See "NADA Title and Registration Textbook," 2008 Edition; see also "The Fast Track to Vehicle Services Facts", American Association of Motor Vehicle Administrators, Section 2, p 42, ("all jurisdictions responding will carry over a brand from another jurisdiction except for[] Alabama, Connecticut, Delaware, New Hampshire, [and] New York.")

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¹⁴ Alabama - When the frame or engine is removed from a motor vehicle and not immediately replaced by another frame or engine; or when an insurance company has paid money or made other monetary settlement as compensation for a total loss of any motor vehicle, such motor vehicle shall be considered to be salvage.

Alaska - Do not have a statutory definition for salvage vehicle. However, they do for "wrecked vehicle"—a vehicle that is so disabled that the whole vehicle cannot be used for its primary function without substantial repair or reconstruction. When a vehicle is wrecked or dismantled, the certificate of title, registration, and plates must be immediately surrendered to the Division. When a wrecked, dismantled, or salvaged vehicle has been reconstructed, it is titled and registered as a "reconstructed" or "specially constructed" vehicle and the title is so annotated.

Arizona - Vehicle that has been wrecked or damaged beyond repair and/or insurance company has determined that the vehicle is a total loss. Also, stolen vehicles not recovered, are issued salvages due to total loss.

Arkansas - When a motor vehicle is water damaged or sustains damage in an amount equal to or exceeding seventy percent (70 percent) of its average retail value.

California - "Total loss salvage vehicle" means a vehicle of a type subject to registration which has been wrecked, destroyed, or damaged to such an extent that the owner, leasing company, financial institution, or the insurance company that insured the vehicle considers it uneconomical to repair the vehicle and because of this, the vehicle is not repaired by or for the person who owned the vehicle at the time of the event resulting in damage.

Colorado - Any vehicle that is damaged by collision, fire, flood, accident, trespass, or other occurrence, excluding hail damage, to the extent that the cost of repairing the vehicle for legal operation on the highways exceeds the vehicle's fair market value immediately prior to such damage, as determined by the person who owns the vehicle at the time of such occurrence or by the insurer or other person acting on behalf of such owner.

Connecticut - Vehicle that has been declared a "total loss" by an insurance company, or by a self-insured organization.

Delaware - Whenever any registered or unregistered motor vehicle, for which a title has been issued by the Department, is transferred as salvage as a result of a total loss insurance settlement.

District of Columbia - Defined by the issuing jurisdiction. No salvage law in the District.

Florida - Motor vehicle or mobile home that is a total loss as declared by an insurance company. If cost to repair the vehicle is more than 80 percent of the current value, the vehicle issued a "Certificate of Destruction".

Georgia - Any motor vehicle that has been (a) damaged to the extent that its restoration to an operable condition would require the replacement of two or more major component parts but shall not mean any such motor vehicle that has been repaired and the title to which is not transferred as a result of such damage or repair; (b) acquired by an insurance company as the result of the vehicle's being damaged to the extent that its restoration to an operable condition would require the replacement of two or more major component parts; (c) an insurance company has paid a total loss claim and the vehicle has not been repaired, regardless of the extent of damage to such vehicle or the number of major components parts required to repair such vehicle but shall not mean or include any stolen motor vehicle, for which an insurance company paid a total loss claim only to the extent that its restoration to an operable condition would not require the replacement of two or more major components parts that have the manufacturer's vehicle identification number plate intact; or (d) is an imported motor vehicle that has been damaged in shipment and disclaimed by the manufacturer as a result of the damage, has never been the subject of a retail sale to a consumer, and has never been issued a certificate of title.

Hawaii - Any vehicle that has been declared a total loss by an insurer and that has material damage to the vehicle's frame, unitized structure or suspension system and the projected cost of repair exceeds the market value.

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Idaho - Any vehicle for which a salvage certificate, salvage bill of sale or other documentation showing evidence that the vehicle has been declared salvage or which has been damaged to the extent that the owner, or an insurer, or other person acting on behalf of the owner, determines that the cost of parts and labor minus the salvage value makes it uneconomical to repair or rebuild. When an insurance company has paid money or has made other monetary settlement as compensation for a total loss of any motor vehicle, such motor vehicle shall be considered to be a salvage vehicle.

Illinois - When an insurance company makes a payment of damages on a total loss car.

Indiana - (1) Insurance company has determined economically impractical to repair and has made an agreed settlement, or (2) cost of repairing exceeds 70 percent of fair market value immediately before accident.

Iowa - "wrecked or salvage vehicle" means a damaged motor vehicle subject to registration and having a gross vehicle weight rating of less than 30,000 pounds, for which the cost of repair exceeds 50 percent of the fair market value of the vehicle, as determined in accordance with rules adopted by the department, before it became damaged.

Kentucky - Damages of 75 percent or more of NADA book value.

Louisiana - A "total loss" motor vehicle that has sustained damages equivalent to 75 percent or more of the market value as determined by the most current NADA book.

Maine - Vehicle, by reason of its condition or circumstance, that is declared a total loss by an insurer or owner, or a vehicle for which a certificate of salvage has been issued by the Secretary of State or by another state.

Maryland - Any vehicle that has been: (1) damaged by collision, fire, flood, accident, trespass or other occurrence to the extent that the cost to repair the vehicle for legal operation on a highway exceeds the fair market value of the vehicle prior to sustaining the damage; (2) acquired by an insurance company as the result of a claim settlement; or (3) acquired by an automotive dismantle and recycle as an abandoned vehicle or for rebuilding or for use as parts only.

Massachusetts - "Total loss salvage motor vehicle," a motor vehicle which has been stolen and unrecovered or that has been wrecked, destroyed or damaged by collision, fire, water, or other occurrence to such an extent that the owner or if the vehicle was insured, the insurer, considers it uneconomical to repair the vehicle and because of this, the vehicle is not repaired by or for the person who owned the vehicle at the time of the event resulting in such damage.

Michigan - A late-model distressed vehicle. Distressed vehicle is defined as a vehicle that has been wrecked, damaged, or destroyed to an extent that the total estimated cost of repair for the vehicle is 75 percent to 90 percent of the vehicle's predamaged cash value.

Minnesota - Any late model vehicle (vehicles that are newer than six years old) or high value vehicle (vehicles valued in excess of \$5,000 prior to damage) that (1) is acquired by a MN licensed insurance company through the payment of damages, or (2) is owned by a self-insured owner and sustains damage in excess of 70 percent of the vehicle's value, or (3) there is a transfer of ownership on an existing MN salvage title, or (4) there is a transfer of ownership from a foreign state salvage title, or (5) a foreign state titled vehicle was damaged in excess of its value.

Mississippi - Motor vehicle will require replacement of more than five minor component parts as determined by insurer or owner and which an insurance company is to obtain from the owner as a result of paying a total loss claim resulting from collision, fire, flood, accident, trespass, unrecovered theft, or other occurrence. The provisions of this section shall not apply to a motor vehicle, which is ten (10) years old or older with a value of one thousand five hundred dollars (\$1,500.00) or less, or to a motor vehicle with damage that will require the replacement of five or fewer minor component parts.

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Missouri - Motor vehicle, semi trailer or house trailer which, by reason of condition or circumstance, has been declared salvage, either by its owner, or by a person, firm, corporation, or other legal entity exercising the right of security interest in it, or by an insurance company as a result of settlement of a claim for loss due to damage or theft; or a vehicle, ownership of which is evidenced by a salvage title.

Montana - "Salvage vehicle" means a vehicle damaged by collision, fire, flood, accident, trespass or other occurrence to the extent that the owner, an insurer, or other person acting on behalf of the owner determines that the cost of parts and labor makes it uneconomical to repair the vehicle.

Nebraska - Vehicle that is a late model that has been wrecked, damaged, or destroyed to the extent that the estimated total cost of repair to rebuild and restore the vehicle to its condition immediately before it was damaged exceeds 75% of the retail value of the vehicle at the time it was damaged.

Nevada - Vehicle is declared as "salvage" by an insurance company as a result of a total loss insurance settlement. The insurance company is required to issue a "bill of sale of salvage" to the purchaser. The insurance company is required to forward the endorsed ownership certificate along with a copy of the "bill of sale of salvage" to the department within 30 days.

New Hampshire - "A total loss vehicle" shall mean either an unrecovered stolen vehicle or one, which has sustained damage or injury so extensive that it is physically or economically impractical to repair.

New Jersey - Any motor vehicle that has been reported stolen or is damaged to such an extent that it is economically impractical to repair.

New Mexico - Vehicle that is damaged by collision, fire, flood, accident, trespass or other occurrence to the extent that the cost of repairing the vehicle for safe operation on the highway exceeds its fair market value immediately prior to damages; or is declared a total loss by an insurance company.

New York - Any 1973 or later model year vehicle that has been transferred to an insurance company in settlement of a claim for damage thereto or theft thereof and any 1973 or later model vehicle that has been sold or disposed of as junk or salvage.

North Carolina - Any vehicle damaged by collision or other occurrence to the extent that the cost of repairs exceeds seventy-five percent (75 percent) of the fair market value.

North Dakota - Vehicle that has been damaged in excess of 75 percent of value.

Ohio - When an insurance company declares it economically impractical to repair a motor vehicle and has paid an agreed price.

Oregon - The following vehicles are subject to salvage title requirements: (1) Vehicles declared a total loss by an insurer obligated to cover the loss or that the insurer takes possession of or title to; (2) A vehicle totaled due to damage and the loss is not covered by insurance; (3) A wrecked, disassembled, dismantled, substantially altered vehicle, or an abandoned vehicle sold under ORS 819.220 or other similar Oregon county or city ordinance, if the buyer intends to: (a) Repair or rebuild the vehicle; (b) Use the frame or unibody to repair or reconstruct another vehicle; (c) Transfer the ownership of the vehicle to anyone except a licensed wrecker whose sole purpose is to completely destroy the vehicle including the frame or unibody.

Pennsylvania Vehicle that is inoperable or unable to meet the vehicle equipment and inspection standards to the extent that the cost of repairs would exceed the value of the repaired vehicle. The term does not include a vehicle that would qualify as an antique or classic vehicle except for its lack of restoration or maintenance.

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Rhode Island - Motor vehicle for which a certificate of title has been issued in this state that has been declared a total loss because of damage of such vehicle, in settlement of a claim for damage or theft.

South Carolina - Vehicle must be declared salvage if it has been damaged to the extent that the cost of repair including all labor and parts is estimated to be 75 percent.

Tennessee - Any passenger motor vehicle which has been wrecked, destroyed, or damaged to the extent that the total estimated or actual cost of parts and labor to rebuild or reconstruct the passenger motor vehicle to its pre-accident condition and for legal operation on the roads or highways exceeds 75 percent of the retail value of the passenger motor vehicle, as set forth in a current edition of any nationally recognized compilation (to include automated databases) of retail values. The value of repair parts for purposes of this subdivision shall be determined by using the current published retail cost of the repair parts to be used in the repair, or in the absence of a published retail cost the reasonable and customary cost in the community where repair parts are purchased. The labor cost of repairs for purposes of this subdivision shall be computed by using the hourly labor rate and time allocations that are reasonable customary in the automobile repair industry in the community where the repairs are performed. "Salvage vehicle" also includes without regard to whether such passenger motor vehicle meets the 75 percent threshold specified in the first sentence, any passenger motor vehicle whose owner may wish to designate as a salvage vehicle by obtaining a salvage title, without regard to the extent of the passenger motor vehicle's damage and repairs. Such designation by the owner shall not impose on the insurer of the passenger motor vehicle or on an insurer processing a claim made by or on behalf of the owner of the passenger motor vehicle any obligations or liabilities.

Texas - A late model motor vehicle, other than a late model vehicle that is a non repairable vehicle, that is damaged to the extent that the total estimated cost of repairs, other than repairs related to hail damage but including parts and labor, is equal to or greater than an amount equal to 75 percent of the actual cash value of the vehicle in its pre-damaged condition.

Utah - Damage by collision, flood, or other occurrence to the extent that two or more major component parts suffer major damage requiring repair or replacement.

Vermont - Vehicle that has been scrapped, dismantled or destroyed or totaled by an insurance company and is less than 10-years old.

Virginia - "Salvage vehicle" means (i) any late model vehicle which has been (a) acquired by an insurance company as a part of the claims process other than a stolen vehicle or (b) damaged as a result of collision, fire, flood, accident, trespass, or any other occurrence to such an extent that its estimated cost of repair, excluding charges for towing, storage, and temporary replacement/rental vehicle or payment for diminished value compensation, would exceed its actual cash value less its current salvage value; (ii) any recovered stolen vehicle acquired by an insurance company as a part of the claims process, whose estimated cost of repair exceeds seventy-five percent of its actual cash value; or (iii) any other vehicle which is determined to be a salvage vehicle by its owner or an insurance company by applying for a salvage certificate for the vehicle provided that such a vehicle is not a nonrepairable vehicle.

Washington - Vehicle whose certificate of ownership has been surrendered to the department due to the vehicle's destruction or declaration as a total loss or for which there is documentation indicating that the vehicle has been declared salvage or has been damaged to the extent that the owner, an insurer, or other person acting on behalf of the owner, has determined that the cost of parts and labor plus the salvage value has made it uneconomical to repair the vehicle. The term does not include a motor vehicle having a model year designation of a calendar year that is at least six years before the calendar year in which the vehicle was wrecked, destroyed, or damaged, unless immediately before the vehicle was wrecked, destroyed, or damaged, the vehicle had a retail fair market value of at least the then market value threshold amount and has a model year designation of a calendar year not more than twenty years before the calendar year in which the vehicle was wrecked, destroyed, or damaged. Washington State Senate Bill 6530, passed during the 2002 legislative session, expanded the definition of salvage vehicle in Washington and added the element of MARKET VALUE THRESHOLD, which is determined annually, based on information in the Consumer Price Index.

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West Virginia - When a vehicle has been determined to be a total loss or otherwise designated as totaled by an insurance company. Amount of damage determines if it can be repaired.

Wisconsin - Vehicle less than seven model years old that is not precluded from subsequent registration and titling and which is damaged by collision or other occurrence to the extent that the estimated or actual cost, whichever is greater, of repairing the vehicle exceeds 70 percent of its fair market value.

Wyoming - Any motor vehicle which has been wrecked, destroyed, or damaged to the extent that it has been declared a total loss by the insurance company or, in the event an insurance company is not involved in the settlement of the claim, the total estimated or actual cost of parts and labor to rebuild or reconstruct the motor vehicle to its pre-accident condition exceeds 75 percent of the actual retail cash value of the motor vehicle.

Source: "The Fast Track to Vehicle Services Facts", a survey of U.S. and Canadian state motor vehicle departments, ©2003 American Association of Motor Vehicle Administrators, Section 2, pp. 31-35.

^x See NAAG Comments at 5 n. 9.

^{xii} "[A]ny competent dealer should already . . . find out a vehicle's history" [and the proposed requirement to disclose vehicle condition and title brand history] "would simply require that dealers share information they already have, with prospective buyers, on a sheet of paper posted on the vehicle." See Consumer Comments at 14. "[Vehicle history and title brand information] is readily available to dealers." See NAAG Comments at 7.

^{xiii} Consumer Comments at 13.

^{xiv} NAAG Comments at 3.

^{xv} "The Fast Track to Vehicle Services Facts", a survey of U.S. and Canadian state motor vehicle departments, American Association of Motor Vehicle Administrators, at Section 2 p. 7-8.

"Indicate the average number of days before a certificate of title is updated on your database:

Alabama - Day prior to issuance

Alaska - Immediate upon issuance of new title

Arizona - Immediate

California - 3 days after application is processed in local office

Colorado - 1 day

Connecticut - Immediate upon issuance of new title

District of Columbia - Immediate upon time it takes to update database

Delaware - Immediate online update of computer files

Florida - Immediate

Georgia - Immediate

Hawaii - Immediate if processed online; one week if batch processed

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Idaho - Immediate
Illinois - Immediate
Indiana - Before the title document is printed
Iowa - Daily
Kansas - 2 days after title is printed
Kentucky - One day
Louisiana - Walk-in: immediate; mail-in: 2-3 days
Maine - 3 days
Maryland - Overnight
Massachusetts - Immediate
Michigan - 1 day
Minnesota - Same day to 10 days. Database is updated the day before the title is issued
Mississippi - 10-20 working days
Missouri - 7 days
Montana - Immediate
Nebraska - Immediate
Nevada - 3 days
New Hampshire - Immediate
New Jersey - Immediate
New York - Immediate
North Carolina - Over-the-counter: Immediate; regular title: 1 week-10 days
North Dakota - Over-the-counter: Immediate; regular title: 1 week-10 days
Ohio - 24 hours
Oklahoma - Immediate
Oregon - 18 days
Pennsylvania - Immediate at time paperwork is processed

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Puerto Rico - 10 days

Rhode Island - 1 day

South Carolina - Immediate

South Dakota - Immediate

Tennessee - 3 weeks

Texas - New automated system-implemented counties: 5 days from receipt of application at headquarters. Specials, non-implemented counties 4–6 weeks

Utah - 4–6 weeks

Vermont - 7 days

Virginia - Immediate

Washington - 24 hours

West Virginia - 7–10 working days

Wisconsin - Immediate

Wyoming - 30 days or less^{xv}

^{xv} NAAG Comments at 8-9, Consumer Comments at 20.

^{xvi} NAAG Comments at 8.

^{xvii} In The following states, the title is issued to the vehicle owner: Arizona, Kentucky, Maryland, Michigan, Minnesota, Montana, New York, Oklahoma, South Dakota, and Wisconsin

In the following states, it is issued to the lien holder: Alabama (issued to owner, mailed to lien holder), Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia (Issued to lien holder if there is a lien holder), Florida (can be mailed to owner if lien holder approves), Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts (can be mailed to owner if lien holder approves), Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

Source: "The Fast Track to Vehicle Services Facts", a survey of U.S. and Canadian state motor vehicle departments, American Association of Motor Vehicle Administrators, at Section 2 p. 13-14.

^{xviii} No connection of any kind is claimed in either the NAAG Comments or the Consumer Comments between vehicle history and manufacturer's warranty coverage.

^{xix} NAAG Comments at 8.

^{xx} NAAG Comments at 4-5; Consumer Comments at 5.

^{xxi} Consumer Comments at 5.

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^{***} NAAG Comments at 7-8 ("[Vehicle history and title brand information] is readily available to dealers through private data sources . . .").

^{****} NAAG Comments at 4-5; Consumer Comments at 5.

